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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NO. .....

E. CLIFFORD HEALD, LOUISE B. HEALD, and BRADLEY HEALD,

Petitioners, Appellants Below,

vs.

UNITED STATES OF AMERICA,

Respondent, Appellee Below.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

I

Summary Statement of the Matter Involved

1. The petitioners, E. Clifford Heald, Louise B. Heald and Bradley Heald, were indicted in the United States District Court for the District of Colorado, charged under former Section 88, Title 18, United States Code, with conspiring among themselves to commit offenses against the United States, to-wit: to violate the provisions of Title 80, Section 18, and of Title 38, Sections 694 and 694a, United States Code; and with further conspiring to defraud the United States through impairing and obstructing the Veterans Administration in the exercise of its governmental function of guaranteeing loans for homes to veterans under said Sections 694 and 694a, Title 38, United States Code, by falsely representing to the Silver State Savings and Loan Association of Denver, Colorado, which was then and there about to make a loan on premises numbered 984 Fairfax Street, Denver, Colorado, to John C. Hess, a veteran, and his wife, that they would sell and were selling said premises to the said Hess and his wife, for the sum of $10,600, when in truth and in fact the selling price of said premises would be $11,500; that the permitted selling price of said premises as fixed and apraised by said Veterans Administration would be $10,600, as the defendants would then and there well know; and that by said false representation to said loan association the defendants would cause the United States, acting by and through said Veterans Administration to guarantee said loan to the extent of $4,000, all of which the defendants well knew, which said loan the United States, acting through said Veterans Administration, would not guarantee were the true facts concerning the selling price of said residential premises known to it.

2. After the filing and denial of motions to dismiss the indictment, petitioners were placed upon joint trial before

a jury in the United States District Court for the District of Colorado, upon the indictment and their several pleas of not guilty thereto, and the case was tried on July 12 to July 15, 1948. Counsel for petitioners moved for several judgments of acquittal as to each defendant at the close of the government's case, and again at the close of all the evidence, which motions were denied, and the case went to the jury. Petitioners were convicted.

3. Subsequently the Court sentenced petitioner, E. Clifford Heald, to imprisonment for eight months and to pay a fine of $1,000; petitioner, Bradley Heald, to pay a fine of $500; and petitioner, Louise B. Heald, to pay a fine of $100; petitioners to stand committed until payment of their respective fines, from which judgment petitioners duly appealed to the United States Court of Appeals for the Tenth Circuit.

4. After the filing of said appeal, the petitioners, E. Clifford Heald and Bradley Heald, each filed motions in the Court of Appeals to remand the case to the trial court with directions to determine whether or not to grant a new trial upon the grounds of newly discovered evidence, and to stay all proceedings upon the apeal, pending such determination, for the reason that, in a trial held after the filing of the appeal in the case at bar, in the same trial court and concerning the same transaction the principal witnesses for the prosecution admitted that they had testified falsely in the trial of the case at bar, and their newly-discovered subsequent testimony upon the issue submitted to the jury as determinative of petitioners' guilt or innnocence would, if truly given upon a new trial, necessitate a judgment of acquittal of the petitioners, or probably result in their acquittal by the jury. The United States Court of Appeals for the Tenth District denied the motion for remand and stay, and affirmed the judgment of the court below.

II

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule 37(b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

III

Questions Presented

The questions presented are:

1. Multiple defendants in a criminal case having exercised ten peremptory challenges to prospective jurors; and the trial court having then granted them, and they having exercised, the right to an additional peremptory challenge under Rule 24(b), Rules of Criminal Procedure, to challenge an additional juror, a Government employee, may the trial court revoke said grant after the challenge has been exercised, recall the challenged juror, and require the defendants to go to trial before the jury upon which the juror so challenged sits?

2. May the trial court of the United States deny to a defendant who takes the stand at his own request pursuant to former Section 632, Title 28, United States Code (now Section 3481, Title 18, United States Code), the right to testify in his own defense concerning matters within his own knowledge upon an issue of fact specifically submitted to the jury as determinative of his guilt or innocence?

3. Can a conspiracy to commit the offense against the United States of violating Sections 694 and 694a, Title 38, United States Code, or to defraud the United States by causing it, acting through the Veterans Administration,

to guarantee a loan to a veteran under said sections, be established wholly by circumstantial evidence, without proof of knowledge on the part of those charged, of the making of the appraisal required to be made and reported to the Administrator of Veteran Affairs under said sections in order to effectuate automatic guaranty thereunder of a home loan to a veteran, or without proof of knowledge on the part of those charged, of the contemplated report of such loan by the lender to the Veterans Administration?

4. Can Sections 694 and 694a, Title 38, United States Code, be so violated by one, not the lender on or buyer of residential property, as to constitute an offense against the United States within the meaning of that term as used in former Sections 88, Title 18, United States Code?

5. Can a general verdict of guilty of conspiracy under former Section 88, Title 18, United States Code, under an indictment charging multiple objects of the conspiracy, be sustained where it is impossible from said general verdict to ascertain which of the offense-objects charged the jury believed the defendants conspired to accomplish, if one or more of the offense-objects charged is not an offense against the United States, or if the evidence is legally sufficient to establish only one, or less than all, of the objects charged to have been conspired?

6. Is a false statement made in a matter within the jurisdiction of a governmental agency, if made to induce the making of a loan by a private lending institution, which the lending institution may or may not thereafter, at its option, submit for governmental guaranty or insurance, when the matter of such loan is one of which the governmental agency has, and will have no cognizance, unless and until the consummated loan is submitted to it for such guaranty or insurance?

7. In view of the constitutional requirements of certainty

in criminal statutes, may former Section 80, Title 18, United States Code, be so construed that a statement not made to a governmental agency, and not required by statute or regulation to be made to anyone, is made in a matter within the jurisdiction of a department or agency of the United States, so that, if false, its making constitutes the oense condemned by said section?

8. Is it legally possible under Sections 694 and 694a, Title 38, United States Code, to effectuate automatic guaranty of a loan made by a supervised lending agency to a veteran for the purchase of residential property, if the price to be paid by the veteran for the property purchased is greater than the appraised value thereof as determined by a proper appraisal made by an appraiser designated by the Administrator; and if it is legally impossible to effectuate such guaranty, can such guaranty be conspired?

9. The trial court having permitted a witness for the government, over the objection of the defendants, and not responsive to any question asked by their counsel, to make voluntary, derogatory and prejudicial statements and remarks not material to any issue in the case, may the harmful effects thereof be erased merely by striking out and instructing the jury to disregard them, when the prosecutor, in his closing argument, submits the same to the jury as a reason and basis for a verdict of guilty?

10. Is it prejudicial error, which an appellate court should note, although no objection was made thereto in the trial court, for the prosecutor to appeal to the passion and prejudice of the jurors upon the basis of derelictions not in evidence, and not material to the issues, and by reference to statements made by a witness on the trial, which the trial court had stricken and directed the jury to disregard?

11. Is a jury correctly instructed that where three are charged with conspiracy, former Section 88, Title 18,

United States Code, means that if any two of the defendants conspired, and any one of them committed an overt act, then all three are guilty, because, after the conspiracy is formed, each conspirator is bound by the acts of the others?

12. Where three are charged with conspiracy, is a jury correctly instructed that in order to justify acquittal of one, they must find that two were members of the conspiracy?

13. Is newly discovered evidence that the testimony of the government's principal witnesses was untrue, and that in a subsequent trial, they so admitted, and testified directly contrary to their former testimony upon an issue specifically submitted at the first trial as determinative of guilt or innocence, sufficient ground for the granting of a new trial?

IV

Reasons for Allowance of Writ

The decision of the United States Court of Appeals for the Tenth Circuit conflicts with decisions of this court and other courts of appeal in the case of *Direct Sales Co. v. United States*, 319 U. S. 703; *United States v. Gilliland*, 312 U. S. 86; *Cramer v. United States*, 325 U. S. 1; *Bollenbach v. United States*, 326 U. S. 607; *Kotteakos v. United States*, 328 U. S. 750, 776; *Terry v. United States*, 131 Fed. (2d) 40 (8th Circ.); *Samuel v. United States*, 169 Fed. (2d) 787 (9th Circ.); and many others; that it erroneously interpreted the provisions of the statutes involved herein and erroneously upheld the actions and rulings of the District Court for the District of Colorado in its interpretations and application of the Rules of Criminal Procedure, all of which more fully appear under paragraph III, "Questions Presented".

Respectfully submitted,

Byron G. Rogers,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NO. .....

E. CLIFFORD HEALD, LOUISE B. HEALD, and BRADLEY HEALD,

Petitioners, Appellants Below,

vs.

UNITED STATES OF AMERICA,

Respondent, Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Tenth Circuit appears in the record submitted herewith at pages 485 to 494. It has not yet been officially reported.

II

Jurisdiction

Jurisdiction is invoked under the provisions set forth in subdivision II of the Petition for Writ of Certiorari.

III

Statement of the Case

Sections 694 and 694a, Title 38, United States Code, are set forth in full in an appendix to this brief. So far as here material they provide:

> "Any person who shall have served in the active military or naval service of the United States * * * shall be eligible for the benefits of this title. Any loan made by such veteran * * * *in compliance with the provisions specified in this title is automatically guaranteed by the government by this title* * * *. Upon making a loan as provided herein, the lender shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the appraisal report made by the designated appraiser. * * *

> "Loans guaranteed hereunder may be made by any * * * building and loan association * * * that is subject to examination and supervision by an agency of the United States. * * *

> "Any loan made by a veteran under this title, the proceeds of which are to be used for purchasing residential property * * * ies automatically guaranteed

if made pursuant to the provisions of this title, including the following:

"That the price paid or to be paid by the veteran for such property * * * does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator." (Italics ours.)

It is to be noted that this statute gives no discretion, power or jurisdiction to the Veterans Administration to grant or withhold guaranty. In this respect it is unique. The guaranty of the government, if it exists at all in any given case, arises automatically and by virtue of the statute itself. Loans made to veterans by a state or federal supervised lending institution (provided, they are made in compliance with the requirements of the statute as to purpose, interest rate, terms of payment and security) are "automatically guaranteed by the government by this title", if

1. The price paid by the veteran for such property does not exceed the reasonable valu thereof as determined by propr appraisal made by an appraiser designated by the Veterans Administration;

2. The lender transmits a report of the consummated loan to the Administrator, identifying the veteran and the property, and stating the amount and terms to the loan; and

3. The lender transmits with the loan report, a report of the appraisel made by the designated appraiser.

The Veterans Administration has prescribed an official form upon which the Home Loan Report is to be made and certified to by the lender (pp. 106, 107 R.), and another official form upon which the appraisal is to be made, reported and certified (p. 113 R.). Designated appraisers are not

agents of the Administrator, but are independent contractors, whose qualifications have been approved by the Veterans Administration under its regulations, 38 C. F. R. §§ 36:4301(i) and 36:4339.

The regulations provide, 38 C. F. R. § 36:4301(cc), that the reasonable value is to be determined "in the light of the prevailing conditions" at the time of sale.

In considering the application of this statute to the case at bar, some of its provisions are especially significant:

1. It is entirely optional with the lender whether or not to report a loan to the Veterans Administration. If he does not elect to report a loan otherwise automatically guaranteeable, no guaranty arises. The Veterans Administration has no cogniance of, and is not concerned with, any loan prior to its consummation, nor thereafter unless and until the consummated loan is reported to it.

2. The Veterans Administration has no power to establish or prescribe any selling price. Neither does it have power to appraise or to establish reasonable value; that is the function of the designated appraiser only.

3. The seller is not within the purview of the statute. Neither the regulations nor the statute require or prohibit anything of the seller, or to operate upon him in any way.

4. The sections referred to are not penal. They define no offense; neither prescribe nor proscribe any course of conduct; and impose no penalty, civil or criminal.

The indictment appears at pp. 18-22 R. and is summarized in the petition for the writ herein.

It does not charge that petitioners conspired with the lender or the veteran, or with anyone else, but only among themselves.

Before trial, the petitioners interposed, and the trial court denied (p. 25 R.), a motion to dismiss the indictment (p. 24 R.) upon the grounds that the same was insufficient to charge, and did not sufficiently charge, an offense against the United States.

Joint trial of all the petitioners was had to a jury. In support of its charge that each of the petitioners, with the knowledge alleged, agreed with the others to the effect charged, the government introduced evidence at the trial from which the knowledge and the agreement charged were sought to be inferred.

The evidence was entirely circumstantial. The government's evidence was entirely concerning acts done by each of the petitioners. From the acts done, it was sought to be inferred that petitioners had agreed among themselves to do them.

So far as Louise B. Heald and Bradley Heald are concerned, the evidence can be stated in few words:

The Case Against Mrs. Heald

John C. Hess, a government witness, testified on direct examination: We made an appointment to meet Mrs. Heald at the house on the evening of June 13, which we did (p. 64 R.). We found her at 992 Fairfax, but she told us that one had been sold (p. 64 R.). She said we could take our pick of the other houses in the block. We looked over 984 Fairfax and then some others and picked 984 Fairfax (p. 64 R.). I asked if it would take a G. I. loan and was advised that it would (p. 64 R.). She told us there was usually a $500 deposit, for which I gave her a check (p. 65 R.). Government's Exhibit 2 (p. 370 R.) is the check I gave her on the night of June 13th (p. 65 R.). Before we left she told me that Mr. Heald would contact we the next day as to when to come

down and make out the receipt and option (p. 65 R.). On cross-examination, he said: Mrs. Heald mentioned that the price of $11,500 was $2,000 under the ceiling price established for the house and that the down payment was $1,900 (pp. 77, 78 R.). That's the last we saw of Mrs. Heald (p. 78 R.). I asked her and she gave me a receipt for the deposit of $500, of which Exhibit B (p. 396 R.) is a carbon copy (p. 79 R.).

Faye L. Hess, a government witness, wife of John C. Hess, testified (pp. 90, 91 R.) to the same effect as Hess.

Otis A. King, a government witness, testified: Before the closing of the deal, we (the Silver State Savings and Loan Association) asked for a check for the initial deposit of $500 (p. 182 R.). That is customary (p. 182 R.). Exhibit J (pp. 182, 183 R.) is the check we received for the deposit on the Hess house (p. 182 R.).

E. Clifford Heald, a defense witness, testified: I prepared on a typewriter Exhibit 15 (p. 392 R.), the original, and Exhibit 4 (p. 273 R.), the carbon copy, of the $10,600 option (p. 214 R.). At the time I prepared them there was nothing on the paper except the printed matter and the pen-written signature of Louise B. Heald. She told me that Mr. Hess would probably be in, and she had to go out, and at my request she signed the blanks and left them with me (p. 214 R.). I filled in the data above the signature (p. 214 R.). On June 26th, at the request of Mr. King, I obtained from my wife and took to the Silver State Savings and Loan Association a check for $500 (Ex. J, p. 435 R.) representing Hess' initial deposit of $500 (pp. 228, 435 R.).

Louise B. Heald testified in her defense: My son, Bradley, told me that if I would sell some of the houses in the Heald project he would give me a commission (p. 266 R.). I made the sale of the Hess property (p. 266 R.). About 6:00 o'clock in the evening of June 13th, Hess and his wife

came out and said they had seen an advertisement of a house, but that house had been sold, and I told them they could take their choice of those that were left (p. 266 R.). They looked at several and picked out 984 Fairfax. I said the price was $11,500. They said they had about $2,000 cash to put into a house and they wondered how the rest could be financed. I said I didn't know whether they could get a loan enough to buy it. Mr. Hess said he was a veteran and he wondered if he could get a G. I. loan. I said I didn't know for sure whether he could or not, but I thought he could, because I understood that if the house was worth the selling price that they could get a G. I. loan. I said this house, I was sure, was worth $11,500 and it had a ceiling price of $13,500, so I thought they could get it, but that I didn't have anything to do with the financing; that the houses were being financed through the Silver State Savings and Loan Association, and Mr. King down there, and if he would talk to him he could see whether he could get a loan. Hess said he certainly would like to buy the house. I said, "Well, you better make a deposit on it to hold it, because I do think it will sell fast at that price." I said that if he would make a deposit and come into the office the next day that I would draw up an option to buy and they could take that down to the Silver State Savings and Loan Association and see if they could get a loan, and if they couldn't, I'd be glad to give their deposit back. Mr. Hess gave me a check for $500 and I gave him a receipt for it (p. 267 R.). He said he would come into the office the next afternoon (p. 268 R.). The next day I went to the office (p. 269 R.). There were quite a few calls coming in and several people said they were going out to see the houses that afternoon (p. 270 R.). I went out to the houses because there were people coming out to see them (p. 271 R.). I was not in the office when Mr. Hess came in (p. 271 R.). Before I left I signed two option forms in blank (p. 271 R.). I signed two because we usually have an original and a copy (p. 271 R.). I had told my husband that I had sold the house at

$11,500 (p. 271 R.). I did not have any knowledge as to the filling in above my signature of whatever data was filled in (p. 271 R.). I had no knowledge of any kind that the Silver State Savings and Loan Association would enter into some attempt to have the government guarantee a part of any loan made to John C. Hess or wife (p. 271 R.). I was not present at the closing (p. 271 R.). I did not have any transactions with the Veterans Administration with reference to the Hess house (p. 272 R.). On cross-examination she said: I never saw a contract to Mr. Hess calling for a purchase price of $10,600 (p. 272 R.).

The foregoing is all the evidence, both of the government and of the defense concerning Louise B. Heald.

The Case Against Bradley Heald

John C. Hess, a government witness, testified: Government's Exhibit 7 (p. 73 R.) is the closing statement we received the day we closed the loan at the Silver State Savings and Loan, June 27, 1947. Bradley Heald signed it at that time in my presence (p. 73 R.). Government's Exhibit 8 (p. 376 R.) is the final check we gave down at the Silver State Savings and Loan Association for all the adjustments, taxes and other costs that we had in connection with the loan, and it came to $609.02, $500 of which was on the down payment (pp. 73, 74 R.). The check is dated June 27, 1947, payable to the order of Bradley Heald, endorsed by him to the Silver State Savings and Loan Association and by it to the First National Bank (pp. 75, 86 R.). I never talked to Bradley Heald; I saw him around; the only time we had any business with him was the time at the Silver State Savings and oan (p. 89 R.).

Otis A. King, a witness for the government, testified on direct examination: Some papers were signed at the office of the Silver State Savings and oan Association June 27,

1947; Bradley Heald was present there (pp. 168, 169 R.). A warranty deed was executed on that occasion (p. 173 R.). Government's Exhibit 16 (p. 392 R.) is a warranty deed from Bradley Heald to John C. Hess (p. 173 R.). I know of my own knowledge it was executed on June 27, 1947 (p. 173 R.). We did not provide the revenue stamps; the deed was brought in already made out with the revenue stamps on it and handed to us by Bradley Heald (p. 173 R.). The deed bore revenue stamps of $12.65, which, translated into selling price, indicated the sale price to be $11,500.00 (p. 173 R.). At the closing Bradley Heald was back and forth into the main office and back into my private office (p. 177 R.). On cross-examination he said: The deed was left with the association (p. 181 R.). It was acknowledged before Dorothy Lambert, who is the secretary of the association (p. 181 R.). Hess' check of $609.02 was received by the loan association for the balance shown by the settlement statement (p. 191 R.).

E. Clifford Heald, a witness for defendants, testified: On Monday evening, June 16, 1947, I told Bradley Heald that Hess had been in on the previous Saturday and wanted to buy the house for $10,600. Bradley said he would not sell it for less than $11,500, and asked me if I would not get in touch with Hess and tell him he could buy the house for $11,500, or his deposit of $500 would be returned to him, just as he pleased (p. 217 R.). On June 25, 1947, I advised Bradley Heald that Mr. King had called me and had said he wanted to make Mr. Hess a loan of $9,600 on 984 Fairfax Street, and if Bradley would leave in the construction loan accounts $1,000 of the proceeds of the Hess sale, in addition to the proceeds of the $9,600 loan, he would close the deal (p. 228 R.). Bradley Heald was at the office of the Silver State Savings and Loan Association when the deal was closed on June 27, 1947 (p. 239 R.). Mr. and Mrs. Hess and O. A. King were in the latter's private office. After they had been there for some time, King called for Brad-

ley Heald and I saw Bradley Heald go in and sign some papers on King's desk (p. 231 R.). Bradley Heald furnished the revenue stamps for the deed; they indicated a consideration of $11,500 (p. 231 R.). I saw the deed after the stamps were affixed. Miss Lambert brought the deed out of King's private office and placed her notarial certificate on it in my presence. The deed had been signed and had the revenue stamps on it at that time (p. 232 R.).

Louise B. Heald a witness for defendants testified: On Friday, June 13th, 1947, I told my son that I had taken a deposit of $500 on 984 Fairfax from Mr. and Mrs. Hess and they were coming into the office the next day (p. 268 R.). I told him I had sold the house at $11,500 (p. 271 R.).

Bradley Heald testified in his own behalf on direct examination: On Friday evening, June 13, 1947, my mother told me she had taken a deposit on 984 Fairfax Street at a price of $11,500 (p. 261 R.). I next saw my father the following Monday evening. He said that Hess wanted him to find out from me if I would sell the house for $10,600. I declined to do so (p. 262 R.). I first met Mr. Hess at the office of the Silver State Savings and Loan Association the day the deal was closed (p. 262 R.). When I went down to the Silver State, Mr. and Mrs. Hess, my father and Mr. King were there (pp. 262, 263 R.). Mr. and Mrs. Hess and Mr. King went into his private office and I stayed in the outer office (p. 263 R.). Pretty soon Mr. King called for me and I went in there and he handed me these papers and said to sign them, which, of course I did. He handed me the deed and the closing statement. I didn't personally go over the closing statement. I just signed all the papers without reading them (p. 623 R.). On my way down to the Silver State I bought the revenue stamps for the deed at the post office in the basement of the Denver Dry Goods Company. Mr. King or Dorothy Lambert, secretary of the loan association, affixed the revenue stamps to the deed (pp. 262,

263 R.). I had no knowledge that Mr. King or the association intended to apply to the government or the Veterans Administration for any guaranty of any portion of the loan they were making to Hess (p. 263 R.). The deed from me to Hess was not brought by me to the Silver State Savings and Loan Association; it was drawn in their office (pp. 264, 265 R.). On cross-examination he testified: I was not present when Hess delivered to E. Clifford Heald a $900 check at his office the day before the closing (p. 265 R.). I never saw Government's Exhibit 15, calling for a sales price of $10,600 for the premises at 984 Fairfax Street (p. 265 R.).

The foregoing is all the testimony, both of government and defense witnesses, concerning Bradley Heald's connection with the Hess transaction.

The Government's evidence, as a whole, tended to show the following facts:

E. Clifford Heald and Louise B. Heald are husband and wife, and Bradley Heald is their son (p. 208 R.). E. Clifford Heald is a lawyer (p. 209 R.). Bradley Heald was the builder and seller of a number of houses known as the Heald project (pp. 259, 262 R.). The ceiling price of each house was fixed by the government at $13,500.00 under the provisions of Priorities Regulation 33 (Ex. A, p. 395 R.). Louise B. Heald was a sales agent for the houses (p. 266 R.).

A preliminary appraisal of 40 houses in the Heald project was made by a committee or panel (Ex. 11, pp. 379, 101, 102 R.) on February 28, 1947 (p. 153 R.), which estimated the valuation of each house, as of March 1, 1947, to be $10,600, of which E. Clifford Heald and Bradley Heald were informed (pp. 234, 259 R.).

There is no evidence in the record that Louise B. Heald ever knew of this, or any, appraisal.

This was not the official appraisal Sections 694 and 694a, Title 38, United States Code, require to be submitted as a basis for automatic guaranty of a loan under said sections, the valuation so estimated did not obtain after three months from March 1, 1947 (pp. 234, 249, 250 R.), and the rule of the Veterans Administration was that the use of a prior appraisal should be confined to appraisals not over three months old (pp. 147, 148 R.).

On June 13, 1947, John C. Hess, a veteran, gave Louise B. Heald a $500 deposit on the residential premises mentioned in the indictment, at a quoted price of $11,500 (pp. 65, 79 R.), receiving a temporary receipt (Ex. B, pp. 79, 396 R.). The following afternoon he went to E. Clifford Heald's office (p. 80 R.), surrendered his temporary receipt (pp. 79, 218 R.) and a formal receipt and option (Exs. 3, C, pp. 66, 81, 218, 370, 371, 396 R.) was signed calling for a consideration of $11,500 of which an "original" and one or more carbon copies had been prepared prior to his arrival (p. 70 R.).

This document was dated June 13, acknowledged the receipt of the $500 as deposit on the purchase price, and provided that if the buyer could not obtain a loan of $9,600 to complete his purchase, the $500 deposit was to be refunded. It did not require the loan to be a "G. I." or guaranteed loan. It was signed, "Heald Investment Co., Broker, by E. C. Heald." Hess read and signed the original and also signed what he was told were carbon copies (p. 69 R.). E. Clifford Heald signed in Hess' presence (p. 66 R.). The original (p. 80 R.) was produced by Hess (p. 66 R.) and a carbon copy by Heald (p. 81 R.) at the trial. They were identical (p. 396 R.).

Hess and E. Clifford Heald went to the Silver State Savings and Loan Association (pp. 83, 169, 219 R.), presented a copy of the $11,500 option to it (pp. 171, 175, 176, 180, 219

R.), and Hess signed a written application for the $9,600 loan upon which the purchase was contingent (pp. 84, 85, 169, 170, 220, 221 R.). This application was made upon a printed form supplied by the loan association (Ex. E, pp. 397-401, 188 R.). It was the only loan application ever made by Hess (p. 190 R.). At some later date the loan association wrote into it, "9,600 for the following purpose: Purchase of home $10,600" (p. 172 R.), but there is no evidence that petitioners knew of the alteration.

Otis A. King, president of the loan association, testified (p. 176 R.) that while his memory of the circumstances was uncertain, his "recollection was" that after the $11,500 option was presented he returned it to E. Clifford Heald, saying, "You know that a transaction like this could not go through this office", and that "we couldn't honor or countenance a deal of this kind", and that later E. Clifford Heald had 'phoned and said that he had decided to sell for $10,600.

There is no evidence whatsoever that Louise B. Heald or Bradley Heald knew or were told of these conversations.

On June 26th an appraisal of the property in connection with the Hess sale was made and reported to the loan association on the officially prescribed form by a designated appraiser. The making thereof is a statutory prerequisite to automatic guaranty under the express provisions of Section 694, Title 38, United States Code.

This appraisal was $10,600, but there is not a scintilla of evidence that any of the Healds ever knew that it was requested or made.

None of the Healds at any time had any dealings with the Veterans Administration, and no document that any of them prepared or signed was ever submitted to that agency, in connection with the Hess transaction.

Hess paid E. Clifford Heald the further sum of $900 to apply on the $11,500 purchase price June 26, 1947 (p. 70 R.). This payment was not made clandestinely or in cash; Heald requested that it be and it was paid by cashier's check (p. 71 R.), for which he gave Hess a written receipt (pp. 71, 86 R.).

Bradley Heald was not present when this transaction took place (p. 71 R.), and did not participate therein (p. 89 R.).

On June 27th the loan association closed the transaction at its office (p. 168 R.). It had previously prepared a Loan Closing Statement (Ex. 7, pp. 73, 373-376 R.).

There is no evidence whatsoever that any of the petitioners prepared or had anything to do with the preparation of this document. It was prepared by the loan association (pp. 169, 181 R.). King testifying as to why the loan association made the various charges and credits (pp. 174, 183, 184, 186, 191, 192 R.).

In this document the association charged Hess with a "borrowers' cost" of $126.02 consisting of insurance, legal charges, etc., and also charged him with a "net desired by borrower" of $10,600.00; credited him with $9,600 from the loan, $17 prepaid costs, and the $500 initial deposit which had been paid over to it by Mrs. Heald; and a "balance due from borrower" of $609.02 was thus exhibited, which Hess paid (p. 86 R.). Bradley Heald, the seller, was credited with $10,600, the amount admittedly received by the loan association for his account, and charged with prior encumbrances and expense items of $7,741.92 (less an error of $3). The balance shown, $2,858.13 (plus the 3), was placed with other funds to his credit with the loan association for payment of construction costs on his project (p. 192 R.).

The closing statement was signed by Bradley Heald and

by Hess and his wife (pp. 73, 192, 263 R.). In it the amount of $10,600 was, of course, used in computing the balance to be transferred to the construction accounts. In this computation, the figure, "10,600.00", was typed in the blank opposite the printed words "sales price".

There is no evidence whatsoever that Bradley Heald personally went over the closing statement or knew its contents when he signed it.

Before Mr. and Mrs. Hess signed the closing statement, King read it to them, while they followed on a copy (p. 85 R.). They questioned the $10600 sales price item (pp. 73, 92, 177 R.). King testified (pp. 171, 177 R.) that E. Clifford Heald produced an original, Exhibit 15, and a carbon copy, Exhibit 4 (pp. 372, 392 R.) of a contract signed "Heald Investment Company, Broker, Louise B. Heald", dated June 14th, calling for a consideration of $10,600, and said, "This is the deal." Hess, on the other hand, testified that he never saw or heard of this contract until he was before the grand jury (p. 68 R.), did not know when he had signed it, and that he had never discussed a contract for $10,600 (p. 294 R.).

There is no evidence whatever that Bradley Heald was present during or heard this discussion of the $10,600.00 item at the closing.

Hess paid a total of $11,500 for the property, getting a loan of $9,600 from the loan asesociation, and, with his wife, signed a note and deed of trust (p. 74 R.). He signed other papers at the office of the loan association, but did not know what they were (pp. 89, 90 R.). Whatever Mr. King asked the Hess' to sign, they signed (p. 92 R.).

Bradley Heald presented at the closing a warranty deed (Ex. 16, pp. 173, 174, 392 R.) to the Hess' which by revenue stamps affixed in the amount of $12.65, showed on its

face that the selling price was $11,500 (p. 173 R.).

About two weeks after the consummation of the loan, the loan association submitted an official form of Home Loan Report, dated July 10, 1947, supported by the June 26th appraisal, to the Veterans Administration, claiming the loan to be automatically guaranteed. It certified thereon, among other things: "That the price paid * * * by the veteran for such property * * * does not exceed the reasonable value thereof as determined by proper appraisal dated June 26, 1947 * * * made by Ben T. Allison, an appraiser designated by the Administrator (appraisal lattached)." (Exs. 13, 14 pp. 106-108, 112, 384-392 R.). In the investigation prior to prosecution, King, in order to exculpate himself in this matter gave the $10600 option to an attorney of the Veterans Administration (p. 172 R.). He had evidently concealed from the prosecuting attorney who presented the case to the grand jury and tried it, the fact that the $11,500 option had been presented to the loan association, for when he admitted it at the trial, the prosecutor said, "I hadn't heard it before; I didn't know" (p. 176 R.).

There is no evidence that Mrs. Heald, prior to the Hess transaction had ever made a sale involving a "G. I." loan, or that she ever knew the practices or requirements involved in such loans.

There is no evidence whatsoever that Bradley Heald or Mrs. Heald knew that guaranty of the Hess loan was contemplated. The loan association was in the business of making real estate loans generally without guaranty (p. 186 R.). It had made unguaranteed loans on houses in the Heald project (p. 187 R.). As to E. Clifford Heald, the record is likewise devoid of such evidence, unless it can be spelled out of the single equivocal statement of King, that in a telephone conversation, not fixed as to time, he had "said that we were cooperating with the Veterans Bureau" (p. 176 R.).

At the close of the Government's evidence, petitioners severally moved for directed verdicts of acquittal (pp. 200-206 R.), which were denied (p. 208 R.).

The Case Against E. Clifford Heald

E. Clifford Heald testified in his own defense: He was in the office in the afternoon, Saturday, June 14th (p. 210 R.). Mrs. Heald had been there but had left. Before doing so she informed him that Hess was expected to come in to get a receipt and option on the house, and at Mr. Heald's request, Mrs. Heald signed in blank and left with him two receipt and option forms (p. 214 R.). Hess thereafter appeared and offered $10,600 for the house (p. 213 R.). The blank forms previously signed by Mrs. Heald were then filled in above her signature as an option at $10,600, to become effective as a contract if that offer should be accepted by Bradley Heald (p. 214 R.). Hess took the carbon copy and Heald kept the original (p. 215 R.). On the following Monday morning E. Clifford Heald delivered the original of the $10,600 option to O. A. King at the Silver State Savings and Loan Association, told him what had transpired with Hess and that the $10,600 offer had not been accepted by Bradley Heald, expressed doubt as to whether it would be accepted, and told King that Hess would probably be in to see him (pp. 215, 216 R.).

On Monday evening, June 16th, Bradley Heald, when informed of Hess' $10,600 offer, declined to sell for that price (p. 217 R.).

Thereafter E. Clifford Heald called Hess to his office and told him Bradley would not sell for less than $11,500, the price originally quoted by Mrs. Heald (p. 217 R.). Hess agreed to buy for $11,500 if he could obtain a $9,600 loan (p. 217 R.). Hess produced his temporary receipt for his initial deposit of $500 made on June 13th (p. 218 R.). The $11,500 option was then prepared in triplicate, dated back to June 13th, and signed by Hess and E. Clifford Heald (p.

218 R.) Hess received one copy, E. Clifford Heald retained one, and Hess and E. Clifford Heald then went to the office of the Silver State Savings and Loan Association, where a third copy was delivered to it; and Hess signed and left with it the application for the $9,600 loan (pp. 219, 220, 221, 222 R.).

On June 25th, O. A. King 'phoned E. Clifford Heald that the Silver State Savings and Loan Association would make Hess the loan of $9,600 if the proceeds of the loan and an additional $1,000 from the sales price of the house would be left with the loan association for credit to Bradley Heald's construction loan accounts (pp. 227, 228 R.). King also asked at that time that an unrecorded deed of the property to Bradley Heald (Exhibit O. pp. 253, 438 R.) and a check for Hess' initial deposit of $500 be brought to the loan association, which was done the next day (pp. 228, 229 R.). Immediately thereafter E. Clifford Heald 'phoned Hess, told him that the deal was to be closed the next day, that the Silver State was going to receive $10,600 of the sales price, that title to the property would then be passed, and asked Hess to bring in a cashier's check for the $900 balance which was not to be left with the loan association (p. 229 R.). Hess brought in the check on the same day and was given a written receipt for it (pp. 229, 71 R.).

At the close of the evidence, the petitioners severally moved for judgment of acquittal (pp. 302-310 R.) upon which the trial court reserved ruling (p. 321 R.) until after verdict, and then denied (p. 365 R.). Verdict and judgment (pp. 35, 36 R.) were as set forth in the Summary Statement.

In selecting a jury at the commencement of the trial, after the prosecutor had exercised one peremptory challenge and petitioners had exercised the ten which were theirs as a matter of right under Rule 24(b) of the Rules of Criminal Procedure, leaving 11 jurors still in the box, one Beuthel,

a Government employee, was called and questioned by the Court. The United States District Court for the District of Colorado does not permit prospective jurors to be questioned by counsel, and they must be guided in their exercise of peremptory challenges only by such information as the Court may have chosen to elicit from the juror. After the trial court had examined Beuthel, it invited petitioners' counsel to excuse him on peremptory challenge. Counsel did so, the juror left the box, and another was called in his place. Thereafter, on objection of the prosecutor, the juror last called was told to step down, Beuthel was recalled over petitioners' objections (pp. 57-61 R.), the jury was then sworn, and petitioners were compelled to go to trial before the jury upon which he sat.

The trial court's charge at the conclusion of the trial submitted the following issue to the jury's determination (p. 353 R.):

> "If you believe from the evidence or if you entertain a reasonable doubt thereof that the Silver State Savings and Loan Association knew the selling price of the property was $11,500.00 and not the sum of $10,600.00, then the Government has failed to prove the charge made in the indictment and you must return a verdict of not guilty as to each defendant."

Upon this issue, the record (pp. 232, 233) shows the following, while E. Clifford Heald was on the stand:

> Q. Will you tell the Court and jury whether or not to your personal knowledge Mr. King knew this selling price was $11,500.00 at the time of the closing thereof?
>
> Mr. Lutz: I object to that, your Honor.
>
> The Court: Objection sustained.
>
> Q. Will you tell the Court and jury whether or not the Silver State Savings and Loan Association,

through its officers, knew the selling price of the so-called Hess property before and at the time of the closing of the sale?

Mr. Lutz: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Robinson: Exception, please, your Honor.

Q. I will ask you this question, Mr. Heald, whether or not you told Mr. King what the selling price of the so-called Hess property, referred to in the indictment, was—

Mr. Lutz: I object to that.

Mr. Robinson: Wait a minute please.

Q. —before the closing thereof?

Mr. Lutz: I object to that, your Honor, for the same reason as incompetent, irrelevant and immaterial, and it is certainly not defensive that these people made false statements to try to prove that somebody else knew them, and I object to them.

The Court: Objection sustained.

Mr. Robinson: Exception.

Thereupon the petitioners made and the trial court denied the following offer of proof (pp. 22, 245-247, 287-289 R.) by the testimony of E. Clifford Heald:

> "That before the closing of the Hess transaction and before the deed passed, the said association was informed personally by the witness, E. Clifford Heald, that the selling price of the property to John C. Hess and his wife was the sum of $11,500 and not $10,600."

The trial court also charged the jury (pp. 352, 353 R.):

> "Should you find from all the evidence in this case that the defendants signed no documents which have

been introduced in evidence before you that went to the Veterans Administration, or that the defendants did not intend to cause the Silver State Savings and Loan Association to report an untrue price to the Veterans Administration, then it is your duty in either event to return a verdict of acquittal.

"You are instructed that it is not sufficient for the Government simply to prove that the defendants, or some of them, by issuing false statements to others simply created the means by which the Silver State Savings and Loan Association, acting independently, made use, to the injury of the Government, of the statements as to the selling price of the house in question; it is sufficient if the Government proves to your satisfaction beyond a reasonable doubt that it was part of the conspiracy that the defendants would knowingly, willfully, and intentionally cause the Silver State Savings and Loan Association to state and represent to the Government that the selling price of these premises was $10,600.00 with knowledge that the same was not true."

Upon the issue of intent thus submitted to the jury, the trial court excluded petitioners' evidence, and refused to permit them to cross-examine the Government's witnesses, as shown by the following portions of the record:

(Direct examination, E. Clifford Heald, pp. 234, 235 R.)

Q. Did you know of the regulations that have been read to the jury here that an appraisal, if this (the preliminary March 1st appraisal) were one at all, could not be used after three months? That's the substance of the regulation. A. I had been told that by the Veterans Administration.

Q. And in connection with this transaction, did you so rely upon that statement? A. Yes, I thought

the Veterans Administration would have to make a new appraisal in connection with the Hess transaction of the property at the time it was sold to Hess, if the Silver State had any intention of asking for a guarantee of their loan after it was made.

Q. Did you know whether the Silver State intended to apply for any guarantee of any part of their loan? A. I did not, no. I had no way—

The Court: Just a minute.

Mr. Lutz: I want to object to that, your Honor.

The Court: Objection sustained and strike it out, and the jury will disregard it. It is an entirely improper question.

• • • • • • •

Q. (By Mr. Robinson) There is an exhibit here called Government's Exhibit 14 which purports to be some appraisal by Mr. Allison, Ben T. Allison, of the property on June 26, 1947—

Mr. Lutz: I object to the form of the question, "purporting to be."

Mr. Robinson: Strike out, "purported."

Q. —which is said to be an appraisal report—

Mr. Lutz: Said to be?

Q. —of Ben T. Allison, under date of June 26, 1947—

Mr. Lutz: It has been identified as being that.

Q. —and identified by Mr. Allison as being that. Did you ever heard of it or see it or know of it?

Mr. Lutz: I object to it as being immaterial whether he did or not.

Mr. Robinson: This goes to intent, knowledge, scienter. It is a criminal case, your Honor, a felony.

• • •

The Court: Objection sustained.

Mr. Robinson: No use going further, Mr. Heald.

(Direct examination, E. Clifford Heald, pp. 227, 228 R.):

Q. Go ahead. What was the next you heard from either Mr. King or Mr. Hess or Mrs. Hess? A. I heard from Mr. King on the 25th, I'd say, of June, two days later. He called me up and said that he wanted to make Mr. Hess a loan of $9,600.00 on 984 Fairfax Street, and he wanted to know if I would not advise Bradley, as a favor to him, to cooperate with him, as he put it, to place a thousand dollars of the proceeds of the Hess sale in this loan account in addition to the proceeds of his $9,600.00 loan and I told Mr. King that I would advise Bradley to do so and that I thought he could rely on it. Then he said after I told him that that he wanted to close the deal.

Q. Now pause there a moment. Do you know of your own knowledge whether or not Mr. King, on behalf of his association, had made loads of $9,600.00 independent of the Veterans Administration on your project?

Mr. Lutz: I object to that as being incompetent, immaterial and irrelevant.

The Court: Sustained.

Mr. Robinson: Your Honor, that goes to the knowledge, scienter in this case. Exception.

(Direct examination of Bradley Heald, pp. 263, 264 R.):

Q. Did you have any knowledge that Mr. King or the association intended to apply to the government or the Veterans Administration for any guarantee of any portion of the loan they were making to the Hess's? A. I did not.

Q. Can you tell the Court and jury in that same connection whether or not Mr. King had made individual loans apart from the Veterans Administration on similar property there?

Mr. Lutz: Objected to.

The Court: Just a minute. Objection sustained.

Mr. Lutz: Immaterial, your Honor.

The Court: It's wholly immaterial what others may have done.

Mr. Robinson: Exception, please.

Hess and King had testified for the government that E. Clifford Heald had helped Hess prepare the application, Exhibit E (pp. 397-401 R.), for the loan (pp. 169, 170 R.) of $9,600 to purchase the house at $11,500.00. King testified that he returned the $11,500.00 contract to E. Clifford Heald and said (p. 176 R.):

"'You know that a transaction like this could not go through this office.' I was incensed over him bringing in one of that type and I said we couldn't honor or countenance a deal of this kind."

Q. What did you do? Did you give it back to him? A. I gave it back to him. I called him in the office and gave it back to him.

When petitioners' counsel attempted to cross-examine King as to this testimony, the following occurred (pp. 186-188 R.):

Q. And as to the loan, an application was made for a loan by Mr. and Mrs. Hess from your concern, was it not? A. Yes, that's right.

Q. And does your concern make loans generally on real estate? A. That is our principal business.

Q. Does your concern make loans on real estate without reference to having any portion guaranteed by the Veterans Administration? A. Yes, it does.

Q. And in connection with the Heald project, have you made loans on real estate that had nothing to do with the Veterans Administration?

Mr. Lutz: I object to that, your Honor, unless he discriminates that he made loans to veterans without guarantee or whether he is talking about the public at large. * * *

Mr. Robinson: Your Honor, if I might proceed in my own way—

The Court: I don't believe so. We have just one issue in this case, and that is the guilt or innocence of these defendants, and this Silver State Company is not on trial. We are not interested in their business except so far as they were involved in the particular transaction set forth in the indictment which is on trial here.

Mr. Robinson: Your Honor, I suggest for your consideration that denial of these questions would be a denial of an adequate cross-examination of this witness. * * *

Q. (By Mr. Robinson) Had you made loans on certain so-called Heald properties apart from this particular Hess transaction?

Mr. Lutz: I object to that as being irrelevant your Honor.

The Court: Answer yes or no.

A. I think we had.

Q. How many? A. Well—

Mr. Lutz: I object to that your Honor as being immaterial and irrelevant.

The Court: I think it is immaterial. Objection sustained.

Mr. Robinson: Exception, please.

Q. You spoke of an application having been made for a loan from your association, on direct examination, and you were shown this Defendant's Exhibit E and asked whether or not that was the application? A. Yes, it was.

Q. I notice that that application is on a printed form headed by the words "Silver State Savings and

Loan Association," and so forth, "Application for Loan"; correct? A. That's correct.

Q. And is that the form that you used for any application for a loan, whether one is guaranteed by the Government or not?

Mr. Lutz: I object to that as immaterial your Honor.

Mr. Robinson: I want to know if this is the same form, your Honor.

Mr. Lutz: I don't know what difference it makes to this case.

Mr. Robinson: The charge is, your Honor, that we had knowledge—

The Court: I understand what the charge is, and I'll sustain the objection.

To rebut King's testimony wherein he said that E. Clifford Heald knew that an $11,500 contract could not go through their office, that King was incensed over it being brought in, and that Heald knew they would not honor or countenance a deal of that kind; and to show that between June 13th, when Hess' deposit was made, and June 27th, when the deal was closed, the loan association had, in fact, to Mr. Heald's knowledge, honored and countenanced such deals, and had made such loans, the petitioners offered, but the trial court excluded, the competent testimony of Mr. Heald in direct rebuttal of King's, which bore directly on the question of intent, as shown by the record (pp. 222, 255-257 R.).

Q. Please tell us that discussion? A. I went into Mr. King's office on that occasion that a man by the name of Reusch, William H. Reusch, had signed a day or two before to purchase the property at 960 Fairfax.

Mr. Lutz: I object to that. He is now going into some other purchase or transaction.

Mr. Robinson: This goes to the knowledge and intent on behalf of Mr. Heald * * *.

The Court: Don't tell anything about the Reusch contract. That's an entirely different deal.

Mr. Robinson: Exception.

Thereupon the petitioners made an offer, which the trial court denied, to prove by the testimony of E. Clifford Heald (pp. 255-257, 34 R.), and by signed contracts (Exs. P, Q, and R, pp. 440-444 R.), offered in evidence and excluded (pp. 255-256 R.), that between June 13th when Hess' deposit was made, and June 27th, when his loan was obtained and the sale completed, Bradley Heald, to the knowledge of the loan association and of E. Clifford Heald, had sold four similar houses in the same block at prices at or exceeding $11,500.00, and that on one of them, the Reusch house, the loan association had made an unguaranteed loan to the buyer to effectuate the sale therof at $11,500.00.

The Government called as a witness a real estate broker, Ben T. Allison, who was one of the panel of three who had made the preliminary March 1st appraisal, and who, as a designated appraiser, made the June 26th appraisal submitted to the Veterans Administration in support of the loan association's claim of automatic guaranty of the Hess loan. He was asked on cross-examination (p. 163 R.):

> Q. There was considerable discussion at the office of the Title Guaranty Co., on April 1, 1947, as to the appraisal that had been made by the so-called panel, was there not?

This question did not ask what was said, but called for a simple "yes" or "no" answer, and petitioners were entitled to have it confined thereto.

Instead of the responsive answer the witness made a lengthy voluntary, uncalled for and prejudicial dissertation

which appears at length at pp. 163-167 R. and which we do not repeat for the sake of brevity.

At the close of the volunteered statement, on motion of counsel with the consent of the prosecutor, the Court ordered it stricken and the jury to disregard it.

Notwithstanding this ruling, the prosecutor in his closing argument appealed to the passion and prejudice of the jury aroused by this testimony, to obtain a verdict against the petitioners. Basing his final argument when petitioners' counsel could not answer him on the stricken testimony he asked for a verdict against the defendants because, as he said, they had charged Hess more than the house was worth, saying (pp. 334, 347 R.):

> "• • • if what Allison said is true about these houses, $10,000.00 is vastly too much. He said they were located upon what had been a swamp and a frog pond, that there was water in every basement, that the construction was substandard that the doors sagged and the floors bulged. If that's the type of house, $10,600.00 was too much for it. • • • Well, gentlemen, you represent the public in this case, you represent the community, you represent the people. I submit that the defendants in this case were successful in duping Mr. Hess to begin with into paying $900.00 more for this house than he had any right to pay. • • • I have yet to be convinced, gentlemen, that the jury will be duped into believing that this was all lily white. The case is respectfully submitted to you, and again I thank you."

In his summation to the jury, commenting on a bank account carried by E. Clifford Heald, as trustee, the prosecutor said (p. 330 R.), contrary to any evidence in the case: "Well, I'll tell you why he had a trustee account at least why most men who carry these blank trustee accounts,

naming no beneficiary, why most men at least have trustee accounts: it's in order to hinder their creditors. A trustee account cannot be attached for an individual debt on execution or garnishment without a great deal of trouble."

And, without any support in the evidence (p. 248 R.) he also said (p. 331 R): "Sometimes they (E. Clifford Heald and Mrs. Heald) would give him (Bradley Heald) a deed to the land the day before the house was sold * * *. The purpose of that, gentlemen, you can surmise as well as I do. I don't know. Whether it was in the event of a mechanics' liens or something of that kind, an attachment if it were in young Heald's name—I don't know. I say, this is all devious and surreptitious dealing."

The trial court gave the jury (p. 355 R.) the following confusing, contradictory and ambiguous instructions:

> "Now, the charge of conspiracy, gentlemen, is rather hard to understand, and I'll give you a further instruction on it. The Federal statutes provide that it shall be unlawful for two or more persons to conspire, confederate, or agree together to commit an offense against the United States * * *.
>
> "That means that if these defendants or *any two of them* had an understanding without a written agreement or without a formal agreement between themselves that they would carry out this scheme which the government charges, and one of them did something to carry it out, any one of the acts which I read to you as charged as overt acts, *then they are all guilty*, because after the conspiracy is formed, if you find it was formed, each conspirator is bound by the acts of the other conspirators, irrespective of whether they know what he is doing or not'"

And (p. 359 R.):

"You are further instructed that this being a conspiracy case while you must consider each defendant's case separately and his guilt separately, you cannot find him guilty of a conspiracy unless you find two or more of them conspired together. There are three defendants here, and the government charges that all three of them conspired. But *if you think that only two of them conspired, then you are justified in finding a verdict of guilty as to those two and acquitting the third one,* or any two out of the three that you may desire. *But, in order to justify an acquittal on conspiracy, you must find at least two or more were members of the conspiracy,* and that one of those two did some act to carry out a conspiracy after it was formed."

The trial court instructed the jury, in substance (p. 353 R.), that if the loan association was informed or knew that the selling price of the property was $11,500, and not $10,600, then they should acquit.

In the Court of Appeals, the appellants moved (pp. 461-472 R.) for remand to the trial court, for the consideration of newly discovered evidence directly upon this issue, and supported their motion by a transcript of testimony (pp. 478-485 R.), given by the government's witnesses John C. Hess and his wife, at a subsequent trial concerning the same transaction. In this testimony, given after the appeal had been filed, these witnesses testified, contrary to their testimony in the case at bar, that in the closing of the transaction, and before the loan was consummated and the deed passed, when they questioned the figures of $10,600 appearing after the printed item "sales price" on the closing statement, Hess stated that he was paying $11,500 for the property; that E. Clifford Heald stated, while King sat and listened, that the Hess' were paying $1900, in addition to the $9,600 loan; that Heald did not try to conceal this fact;

that at no time did he state that the selling price was not $11,500; that Heald recapitulated the items comprising the $1900 to-wit, the $500 initial deposit, the $900 paid to E. Clifford Heald, and the $500 paid at the closing and stated that the $1,900 plus the $9,600 loan made up the purchase price, and the purchase price of 11,500, and the items comprising it, were gone over and discussed in detail with Mr. King before the deed passed.

The motions also set forth, supported by a transcript of the testimony given at the subsequent trial (pp. 472-476 R.), that thereat O. A. King admitted that his testimony in the case at bar was untrue wherein he said that the deed by which the sale was effectuated was not prepared in his office, but was brought in to the closing already prepared, and with the revenue stamps already affixed. In the subsequent trial, he admitted that, as Bradley Heald had testified in the case at bar (p. 264 R.), the deed had been prepared in the office of the loan association, and that Bradley Heald presented at the closing, revenue stamps indicating a consideration of $11,500 for affixing to the deed.

The Court of Appeals denied the motions (pp. 495, 496 R.), without referring to the change of testimony of Mr. and Mrs. Hess, upon the stated ground that the newly discovered evidence was of such a nature that on a new trial it would not probably bring about a different result (p. 494 R.).

Since comparison of the opinion of the Court of Appeals with the record indicates that court to have been under misapprehension as to the purport of the evidence in many instances, we have made the above statement. It is believed that reference to the record will reveal that statment to be accurate where it is in conflict with the Opinion. Some of the inaccuracies in the Opinion we desire to point out specifically:

The opinion states (p. 490 R.): "The Loan Closing Sheet, prepared by Bradley Heald, indicated the sale price of the house to be $10,600.00." There is not a word of evidence that Bradley Heald prepared this document. It bears internal evidence that the loan association prepared it, and its president, O. A. King, testified (pp. 174, 183, 184, 186, 191, 192 R.) as to why the loan association made the various changes and credits contained in it.

The opinion states (p. 490 R.) that the $900 paid by Hess to E. Clifford Heald, June 26th, was paid in the presence of Bradley Heald. Hess' testimony was to the contrary (pp. 71, 89 R.).

The opinion states (p. 489 R.): "The houses were all appraised by the Veterans Administration on March 17, 1947." No such evidence appears in the record. There were two appraisals shown in evidence, to-wit: The preliminary appraisal of 40 houses on February 28th by a committee, estimating March 1st, 1947, valuation to be $10,600 per house; and the individual appraisal of 984 Fairfax on June 26th which was submitted to the Veterans Administration July 11, 1947, as the basis for claim of automatic guaranty of the Hess loan.

The opinion states (p. 491 R.) that all the Healds "knew that the house could not take a G. I. loan if sold for more than $10,600". Such is not the evidence. They knew, or at least the law charged them with knowledge, that a loan on the house could not be guaranteed if an appraisal in connection with the Hess sale should be less than the $11,500.00 selling price. Such an appraisal was made on June 26th, but there is not a word of evidence in the record that they knew of it.

The opinion states (p. 491 R.) that the Healds "all knew that such a loan (a G. I. loan) was necessary or there could

be no sale". They knew that Hess had to get a loan to purchase the property, but there is no evidence that Louise B. Heald or Bradley Heald knew it had to be a G. I. loan; nor is there evidence that, in fact, it had to be a G. I. loan. The evidence showed that the loan association was in the business of making unguaranteed loans and had made such loans on the Heald project.

The opinion states (p. 490 R.) that "It developed, however, that on this occasion (the signing of the $11,500 option) Hess had actually signed another and different contract bearing the date June 14, 1947, calling for a purchase price of $10,600.00", and that (p. 491 R.) "E. Clifford Heald performed the sleight of hand trick with the two contracts". There is no such evidence. This is pure suspicion, surmise and conjecture. Hess' testimony was that he had never knowingly signed the $10,600 contract, although it bore his signature, and had never discussed such a price. If speculation is to be indulged, it is equally consistent with the proven facts to state as a fact that Hess signed the $10,600 contract at the closing and that O. A. King performed the sleight of hand trick, if there was one, for the evidence was that at that time Hess signed papers the nature of which he did not know (pp. 89, 90 R.), and that the Hess' signed whatever Mr. King asked them to sign (p. 92 R.).

The opinion erroneously states (p. 490 R.) that the loan of $9,600 made to Hess and his wife "four thousand of which was guaranteed by the Veterans Administration". To the contrary, the government's evidence proved that the loan was not guaranteed, for it proved that the selling price, $11,500, was in excess of the appraisal of June 26th of $10,600, and thereby proved that the loan was not guaranteed. The guaranty, if it exists at all, is automatic, and the Veterans Administration cannot grant or withhold it. It arises, if at all, only in the event "the price paid or to

be paid by the veteran for such property does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator".

The opinion states (p. 489 R.): "E. Clifford Heald, along with one Ginsberg, owned the lots on which the houses were built and these two from time to time deeded the houses to Bradley Heald so as to enable him to execute deeds to purchasrs". The only evidence on this point (p. 248 R.) is to the contrary.

The opinion states (p. 489 R.) that Hess made his $500 initial deposit on the property June 12, 1947, and went to the office of E. Clifford Heald to get the receipt and option on June 13th. The undisputed evidence of all the parties is that the initial deposit was made with Mrs. Heald on June 13th, which was the first time Hess saw any of the parties; that he first went to Heald's office on June 14th, which is the date of the $10,600 option; and that when the $11,500 option was prepared and signed, which is dated June 13th, Hess produced the temporary receipt which he had received from Mrs. Heald on June 13th.

The opinion states (p. 490 R.): "Also, on June 26, 1947, E. Clifford Heald took the $10,600.00 contract to the Silver State Savings and Loan Association and closed the transaction". All witnesses, prosecution and defense, are agreed that the closing was June 27th, not June 26th, and was handled by Mr. King, president of the loan association, which made all adjustments, charges and credits, retained all papers, collected and accounted for all moneys paid at the closing, and credited the balance to Bradley Heald's construction funds.

On other points, as well, we are confident that our statement is a fair and accurate reflection of the record.

IV

The statutes involved in this case are set forth in an appendix to the brief. They are former Section 88, Title 18, United States Code, repealed before the appeal to the United States Court of Appeals, and re-enacted as Section 371, Title 18, United States Code; Sections 694 and 694(a), Title 38 United States Code; former Section 80, Title 18, United States Code, repealed after the trial, and ree-nacted, so far as here material, as Section 1001, Title 18, United States Code; and former Section 632, Title 28, United States Code, re-enacted as Section 3481, Title 18, United States Code.

There is also involved herein an interpretation of Rule 24(b), Rules of Criminal Procedure, the pertinent portions of which are set out under Point 1 hereafter.

V

Errors Intended To Be Urged

The errors committed below, which raise the questions enumerated in the Petition for Writ of Certiorari, and which petitioners intend to urge herein, are the following:

1. Error in recalling a juror peremptorily challenged by petitioners and permitting him to act as a juror during the trial.

2. Error in refusing the petitioners the right to testify in their own behalf as to material matters upon issues that were subsequently submitted to the jury.

3. Error in refusing to grant a judgment of acquittal because of the insufficiency of the evidence.

4. Sections 694 and 694a, Title 38, United States Code, are not penal and violation thereof is not an offense against the United States as condemned by Section 88, Title 18, United States Code.

5. The alleged false representations were not made in a matter within the jurisdiction of a department or agency of the United States.

6. There was no evidence that petitioners agreed or conspired to cause the Veterans Administration to guarantee the Hess loan.

7. A general verdict of guilty without special findings as to the acts on which it rests where it is not possible to identify the grounds for the conviction will not be upheld where any of the separable acts are insufficient. (*Cramer v. United States,* 65 S. Ct. 918, 325 U. S. 1.)

8. Error in permitting Ben T. Allison, a witness for the government, to make voluntary, derogatory and prejudicial statements on cross-examination not in response to any questions, which prejudice could be erased by an instruction to the jury to disregard the same.

9. The trial court erred in not noticing and correcting during the argument of the prosecutor an appeal to passion and prejudice upon matters not in evidence nor material to the issues and by reference to statements made by a witness and ordered stricken.

10. The trial court erred in giving erroneous, ambiguous and conflicting instructions to the jury.

11. Failure of the Court of Appeals to remand the cause to the District Court based upon newly discovered evidence.

VI

ARGUMENT

POINT 1

Error in recalling a juror peremptorily challenged by petitioners and permitting him to act as a juror during the trial.

This point is based upon the matters appearing at pages 57 to 60 of the record, and summarized in the Statement of the Case, at pages 26 to 27 of this brief, concerning the peremptory challenge of the juror, Beuthel, a government employee.

There were three defendants on trial, represented by the same counsel. The pertinent provisions of Rule 24(b) of the Federal Rules of Criminal Procedure are as follows:

> "PEREMPTORY CHALLENGES. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. *If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges.* * * * *If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.*" (Italics ours.)

It will be noted that the rule provides that when there is more than one defendant, the court may grant additional peremptory challenges. The Court did so, and the additional challenge was exercised as to the juror, Beuthel. The prosecutor then objected that the defendants were exhausting an extra challenge. The trial court said, "That was the intent", but then reconsidered, told the juror who had taken Beuthal's place to step down, and recalled Beuthal (pp.

58-59 R.). It is apparent from the record that in doing so, the trial court mistakenly thought that it had exceeded its powers in granting the additional challenge, overlooking the provisions of the rule above referred to.

We urge that the trial court having had the power to grant the challenge, which the defendants in good faith exercised upon the Court's invitation, and the juror having been advised thereby that he was unacceptable to the defendants, they were prejudiced by his recall and service.

The purpose of granting a defendant the right to peremptory challenges is not to excuse from service jurors whose bias and prejudice has been so demonstrated that they may be challenged for cause, but to afford a defendant opportunity to challenge a juror whom he may believe to entertain a prejudice or bias that is not so readily demonstrable. In a very recent case, *Frazier v. United States*, —— U. S. ——, 69 S. Ct. 201, this Court said:

> "The right of peremptory challenges is given, of course, to be exercised in the party's sole discretion and • • • in aid of the party's interest to secure a fair and impartial jury • • •".

In sustaining the action of the trial court, the Court of Appeals concedes that petitioners' challenge of this juror may have created a prejudice in his mind (p. 492 R.), but says it was their duty to search the mind of the juror and to examine him, in order to determine if any bias or prejudice existed on his part, and having failed to do so, they may not now complain. Of what use would it be for the defendants to satisfy themselves that the juror was biased or prejudiced, when the Court had recalled their right to challenge him, and indicated its belief that it had no power to excuse him?

In any event, if there was a failure in any duty to examine him, it was that of the trial court, not of the petitioners, for the record discloses that all examination of the jurors was conducted by the Court, not by counsel, and the United States District Court for the District of Colorado has never permitted, and in this case did not permit, any examination of prospective jurors by counsel.

The trial court's ruling in recalling the juror was not based upon any belief as to his bias, or lack of it, but upon the trial court's mistaken belief that the rule did not give it the power to extend the privilege which it had granted. The result was to deny the petitioners a right which became absolute when the Court granted it to them, its recall was unauthorized, and through no fault of the petitioners, placed them in a worse position than they would have been in if the Court had never invited their challenge of the juror.

POINT 2

Error in refusing petitioners the right to testify in their own behalf as to material matters upon issues that were subsequently submitted to the jury.

This point concerns the action of the trial court in refusing to permit the petitioners to testify in their own behalf on the issues submitted to the jury as determinative of their guilt or innocence.

The portions of the record where the action complained of appears, are set forth in the Statement of the Case, at pages 27 to 32 of this brief.

The right of a person charged with an offense in the courts of the United States to take the stand in his own defense is one which Congress has given him by the provisions of former Section 632, Title 28, United States Code.

If, when he has taken the stand, his testimony on matters within his own knowledge bearing directly on the issues, is excluded, as it was in the case at bar, the right given him is, in effect, denied. Such denial is not a mere technical error, which does not affect his substantial rights. This Court said in *Bruno v. United States,* 308 U. S. 287, 84 L. Ed. 257, 60 S. Ct. 198:

> "Is the disregard of the right which Congress gave to Bruno an error, the commission of which we may disregard? We hold not."

The ruling complained of here is in direct conflict with the opinion of the Circuit Court of Appeals of the Eighth Circuit in the case of *Buchanan v. United States,* 233 Fed. 257, where the Court said at pages 258-259:

> "Intent in respect of the federal right is an essential element of the offense charged. See *United States v. Waddell,* 112 U. S. 76, 80, 5 Sup. Ct. 35, 28 L. Ed. 673. The legal quality and consequences of an act are not always apparent or definitely indicated. Some acts are of such an equivocal or ambiguous character that the judicial inquiry turns wholly upon the particular motive which may be disclosed by extrinsic evidence. • • •
>
> "The trial court excluded various questions asked the accused by their counsel to elicit their belief that Buchanan owned the improvements, the grounds of their belief, and their intent in what they did. Whenever the belief of a person, or the motive or intent of his act or conduct is material, he may testify directly what it was. *Wigmore on Ev.,* § 581. He may also give the grounds of the belief upon which his motive or intent proceeded, including the statements of third persons to him. Id. §§ 245, 655, 1789."

The Court of Appeal's decision is also in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit, which, in a case where the facts were quite similar to the case at bar, *C. I. T. Corporation v. United States*, 150 F. (2d) 85, 95, said:

> "Any fact tending to show lack of intent to defraud by concealment is proper to be considered by the jury. * * *" *Miller v. United States*, 10 Cir., 120 F. (2d) 968, 970; *Cochran v. United States*, 157 U. S. 286 298, 15 S. Ct. 628, 39 L. Ed. 704; *Williamson v. United States*, 207 U. S. 425, 453, 28 S. Ct. 163, 52 L. Ed. 278."

The Circuit Court of Appeals for the Fourth Circuit said in *Hyde v. United States*, 15 F. (2d) 816, 821:

> "The intent to deceive or defraud the government or its officials by what was done, or to misappropriate the funds of the bank, in which the bonafides, intent, purpose, or motives of misappropriation were essential features of the transaction, and the exclusion of testimony from which reasonable and fair inferences might have been drawn, throwing light on these questions, was of the utmost importance to the accused. The case of *Crawford v. United States*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, gives special consideration to this subject, viz.: 'There is a presumption of harm arising from the existence of an error, committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment.' See, also, *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653; *Smith v. Shoemaker*, 17 Wall. 630, 21 L. Ed. 717."

POINT 3

Error in refusing to grant a judgment of acquittal because of the insufficiency of the evidence

The error here assigned is that of refusing to grant a judgment of acquittal because of the insufficiency of the evidence, the point being that the proof being circumstantial, it failed because of the failure to prove the knowledge which was essential to the intent charged.

The evidence in this case was wholly circumstantial. The direct evidence concerned what the defendants had done, not what they had agreed. From what they had done, the agreement was sought to be inferred. The well understood rule in conspiracy cases is, that as to each defendant, the existence of the conspiracy, and his participation therein, cannot be proven by the acts or declarations of his alleged co-conspirators done or made in his absence, but must be established by independent evidence. While evidence in a conspiracy case may be circumstantial, equivocal evidence will not suffice. In *Direct Sales Co. v. United States*, 319 *U.* S. 703, 63 S. Ct. 1265, 87 L. Ed. 1674, the Court said:

> "The proof, by the very nature of the crime, must be circumstantial and therefore inferential to an extent varying with the conditions under which the crime may be committed. *But this does not mean either that the evidence may be equivocal.*" (Italics ours.)

The requisites of a prima facie case, without which submission to a jury is reversible error, are concisely stated in *Enrique Rivera v. United States*, 57 F. (2d) 816, 822, in the following words:

> "The evidence is circumstantial. In order to sus-

tain a conviction on circumstantial evidence, all the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent."

In *Tingle v. United States,* 38 F. (2d) 573, the Court said:

> "Circumstances merely arousing suspicion of guilt are insufficient. * * * when the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value."

As to what was done by Louise B. Heald and Bradley Heald, there is no material conflict between the government's evidence and that of the defense, yet if their relation of the facts was true, they did not conspire or agree with the knowledge or to the effect charged in the indictment, or at all.

As to Louise B. Heald, the circumstances proved were merely consistent with guilt, but not probative thereof, for they were equally consistent with innocence.

As to Bradley Heald, the circumstances proved were not even consistent with guilt, for the government proved that as the final step in the plan in which it charged he concerted to deceive the loan association as to the selling price of the property, he produced and delivered to it a warranty deed showing on its face the true selling price, $11,500. If the plan and intent was not to deceive the loan association, the whole elaborate fabric of inference on inference which was the government's case, collapses.

As to Mrs. Heald and Bradley Heald, the fundamental defect in the government's proof was its failure to prove the knowledge necessary to support the inference of intent, without which the proof failed.

As to them, there was no proof whatsoever that they knew E. Clifford Heald had misrepresented the selling price to the loan association. There was no proof whatsoever that they knew the matter of the Hess loan was within the jurisdiction of the Veterans Administration, if it was. There is no proof that any of the petitioners knew of the June 26th appraisal, which was a condition precedent to guaranty, or that at the time of the Hess transaction the appraised value of the property purchased was $10,600. There is no proof that they knew guaranty of the loan was contemplated.

The ruling of the trial court in refusing acquittal, and the decision of the United States Court of Appeals for the Tenth Circuit upholding the ruling, are in conflict with the opinion of this court, in *Direct Sales v. United States, supra,* where it is said:

> "Without the knowledge, the intent cannot exist. *United States v. Falcone, supra.* Furthermore, to establish the intent, the evidence of knowledge must be clear not equivocal. *Ibid.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

Nor could the knowledge be inferred, for the proof does not meet the criterion established therefor in the case last cited, and which is stated in other language in *Braatelien v. United States,* 147 F. (2d) 888, 895, wherethe Court said:

> "If such activities are so numerous as to constitute a system of unlawful conduct continuing over a period of time, then a jury upon evidence of such facts will be warranted in finding them guilty as conspirators. *Direct Sales Co. v. United States,* 319 U.

S. 703, 63 S. Ct. 1265, 87 L. Ed. 1674; *Egan v. United States*, 137 F. (2d) 369 at page 378; *Alexander v. United States*, 8th Cir., 95 F. (2d) 873, 878."

No such proof to sustain an inference of knowledge was made in the case at bar.

No matter how reprehensible the conduct of E. Clifford Heald may have been, and whatever substantive offenses he may have been guilty of, if the evidence failed to establish that Louise B. Heald and Bradley Heald conspired and agreed, with the knowledge and intent, and to the purpose, charged in the indictment, proof of such agreement entirely failed, for only three were charged to be parties to the unlawful agreement.

POINT 4

Sections 694 and 694(a), Title 38, United States Code, are not penal and violations thereof is not an offense against the United States as condemned by Section 88, Title 18, United States Code.

The point here raised is that violation of 38 U. S. C., §§ 694, 694a, of a non-penal statute, is not an offense against the United States, and hence a conspiracy to do so is not within the condemnation of Section 88, Title 18, United States Code.

The trial court charged the jury (p. 355 R.) that, "The Federal statutes provide that it shall be unlawful for two or more persons to conspire confederate or agree together to commit an offense against the United States." It is further charged the jury (pp. 352-353 R.) as to the provisions of Section 694a, Title 38, United States Code, and upon the basis of this charge, the prosecutor urged for conviction (p. 344 R.) that "let us remember that we start with this,

that the price of $11500.00 charged to Mr. Hess was illegal in the first instance, because they knew the appraised value was $10,600.00."

Although *United States v. Hutto,* 256 U. S. 636, 41 S. Ct. 541, 65 L. Ed. 1073, holds that an offense against the United States need not be a crime, but only a violation of a statute providing a civil penalty, this case has never been construed to hold that an offense against the United States within the meaning of the conspiracy statute can consist in violating a statute which provides for no penalty or forfeiture and which denominates no conduct an offense. In *United States v. Brown,* 4 F. (2d) 270, and *United States v. Brown,* 6 F. Supp. 331, District Courts independently reached the conclusion that notwithstanding general language used in the Hutto case, "offense" as used in the conspiracy statute must have for support a contemplated offending to which a penalty or forfeiture attaches.

Sections 694 and 694a, Title 38, are not penal and prescribe no penalty. They meet none of the constitutional requirements of a statute defining and punishing an offense. There is, therefore, no substantive offense of violating these sections, and a conspiracy for their violation is not a conspiracy to commit an offense against the United States.

POINT 5

The alleged false representations were not made in a matter within the jurisdiction of a department or agency of the United States.

Former Section 80, Title 18, United States Code, condemns, not all false representations, but only those made in a matter within the jurisdiction of a department or agency of the United States.

The indictment does not allege, nor did the proof show, that the petitioners made, and therefore did not show that they conspired to make, any representation to the Veterans Administration. The charge of the indictment in this respect is (p. 18 R.): "which premises the said defendants would knowingly and wilfully, falsely and fraudulently represent and state to said the Silver State Savings and Loan Association, that they would sell and were selling, to John C. Hess, a veteran, and his wife, Faye L. Hess, for the sum of $10,600; when in truth and in fact, said defendants would be and were selling, to the said veteran and his wife, said residential premises for the sum of $11,500."

This representation to the loan association was not made in a matter within the jurisdiction of the Veterans Administration.

In its opinion (p. 488 R.) the Court of Appeals said: "It is true, as contended by appellants, that the sale of the house was not a matter which was within the jurisdiction of the Veterans Administration, but passing upon applications for guaranteed loans in connection with such sales was within its jurisdiction, and the false representations which appellants caused to be made pertained to matters within its administration as an agency of the United States."

In this holding we urge that the Court of Appeals erred, and its decision is in conflict with that of the Circuit Court of Appeals for the Eighth Circuit, which arrived at a directly contrary conclusion in the case of *Terry v. United States*, 131 F. (2d) 40.

In the Terry case, as here, the false representations were made to a lending institution in connection with the application for a loan which the lender, as in the case at bar, might or might not, at its own election, thereafter submit

for guaranty or insurance by a government agency—in the Terry case, the Federal Housing Administration, in the case at bar the Veterans Administration. The questions presented by the two cases are, therefore, identical, to-wit: whether the matter in which the representations were made, was one within the jurisdiction of the federal agency. The Court of Appeals for the Eighth Circuit in the Terry case answered this question in the negative saying what is equally applicable in the case at bar:

> "We consider first the contention that there was no proof that the statute was violated—that is, that the acts shown to have been done in Missouri were not 'in a matter within the jurisdiction of the Federal Housing Administration.' • • •
>
> "It is clear that the Housing Administration had no cognizance of the Williams loan transaction on which the indictment rests at the time of the commission of the acts charged against defendant in respect to that transaction. Whether the Administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may be converted into a crime at a subsequent time by the independent action of other persons."

We also urge that upon this question the decision of the United States Court of Appeals for the Tenth Circuit is in conflict with this Court's decision in *United States v. Gilliland*, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598, decided soon after the provisions of Section 80, Title 18, with which we are here concerned, were first enacted in 1934.

It is essential to due process of law that the phrase, "in

any matter within the jurisdiction of any department or agency of the United States," be susceptible of construction with the particularity constitutionally necessary in the definition of a crime.

To give the statute here under consideration such valid construction, it is submitted that a statement or representation not made to a governmental agency is made a matter within its jurisdiction, only if and when the agency has lawfully required by regulation or otherwise, the making of the statement or representation, to the person to whom it is made, by the person making it, and at the time that it is made. Unless the statute be so construed, it does not meet the test of a certainty applied by this court in the Gilliland case to uphold its validity.

The Court there held that the legislative intent in creating the new offense was to provide a sanction to restrain the false making of statements which statute or regulation should require to be truly made; and that if it be construed in the light of that legislative intent, and in conjunction with the regulation requiring the statement, it erects a sufficiency definite standard of conduct to save it from invalidity for uncertainty, saying:

> "Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports *required* has been sufficiently described and the *duty enjoined* had been adequately defined. Any one presenting the *required* affidavits and reports to the board set up under the pertinent regulations was suitably charged with *notice of the consequence* of knowingly and willfully including therein any false and fraudulent statements." (Italics ours.)

In the case at bar the sellers, who made the representations, made them, not to the Veterans Administration, but

to the loan association. No statute or regulation required the making of the statements they made. Whether or not the Veterans Administration has power to promulgate a regulation requiring the seller to certify to the selling price in connection with a sale to a veteran, the fact remains that it has not done so. The seller is not within the purview of Sections 694 and 694a, Title 38, United States Code, or of the regulations of the Veterans Administration promulgated pursuant thereto, 11 Fed. Register 2118-2126, 38 C. F. R., §§ 36:4300-36:4375.

We earnestly urge therefore, that in view of the conflict between the decision of the United States Court of Appeals in the case at bar and that of the Eighth Circuit in the Terry case, and in view of this Court's decision in the Gilliland case, the case at bar should be reviewed, and that this Court should decide the question here presented.

Under the view of the statue taken by the Court of Appeals in the case at bar, one may be prosecuted for a statement not made to a department or agency of the United States and where no suitable warning is given by statute or regulation that the matter in which he makes the statements is within the jurisdiction of the governmental department or agency or of the consequences of falsely making them. Such construction merits the criticism which a district court expressed in the following language in *United States v. White,* 69 F. Supp. 562:

> "For instance, if in a conversation with a brother lawyer one should deliberately misstate his income for last year, one would be guilty of a crime because the investigation of violations of the income tax law is under the 'jurisdiction' of the Bureau of Internal Revenue. And you can carry it further. You can get it down to where if one lied to a neighbor or friend about one's age, or actual residence on a particular

street, it would be a crime for making a false statement in connection with a matter within the 'jurisdiction' of some department of the government, because certain agencies of the government are charged with enforcement of the Selective Training and Service Act of 1940, 50 U. S. C. A. Appendix, § 301 et seq, and the age and residence of male persons are material facts in connection with the administration of that law. Examples can be multiplied."

POINT 6

There was no evidence that petitioners agreed or conspired to cause the Veterans Administration to guarantee the Hess loan.

The government charged that petitioners agreed or conspired to cause the Veterans Administration to guarantee the Hess loan, but its own evidence established that whatever they may have conspired, if they did conspire, they did not conspire this.

The government proved that the purchase price was $11,500, and the appraised value only $10,600. Thereby the government affirmatively established beyond all doubt that the loan was not guaranteed, for the Veterans Administration has no power to grant or withhold guaranty—the guaranty, if it exists at all, arising automatically from the actual, not the represented, relationship between the purchase price and the appraised value, by virtue of the terms of the statute itself, and not from any exercise of power, jurisdiction or governmental function by the Veterans Administration. No one would contend, in view of the language of the statute itself, that there exists in fact any liability of the government on the Hess loan, or that in case of default and loss, the Silver State Savings and Loan Association can enforce any contribution from the government.

Nor does the statute invest the Veterans Administration with any power or authority to subject the government to such liability.

The petitioners were not only charged by law with notice of the statute, but they were entitled to rely thereon. Since it is impossible that the Veerans Administration could guarantee the loan, it is equally impossible to conspire such guaranty. If the petitioners did not know that the appraised valuation was $10,600, that allegation of the indictment failed of proof. If they did know it, then they also knew from the statute itself that the auomatic guaranty would not arise, and that the Veterans Administration could fasten no such liability on the government. If, therefore, it was a conspiracy to defraud any one, it was the loan association and not the government, for the loan association was left holding an unguaranteed loan, but the Veterans Administration does not have the governmental power or function of guaranteeing loans which the indictment charges the petitioners conspired to impair.

In considering this contention, the opinion of the United States Court of Appeals for the Tenth Circuit in this case says (p. 487 R.), that a conspiracy to defraud the United States does not have to contemplate or result in pecuniary or property loss to the government, but that is beside the point. The cases cited in the opinion hold that a conspiracy to defraud the United States may be one to obstruct by fraud or deceit an officer or agency of the government in the exercise of a governmental function, but the point is, that under the facts alleged and proved in the case at bar, the Veterans Administration did not have the governmental function, and, therefore, it was impossible to impair, or conspire to impair, such function.

A case illustrative of the principle is *Blunden v. United States*, 169 F. (2d) 991, decided by the United States Court of Appeals for the Sixth Circuit within the last year.

In that case, the defendants were charged under Section 91, Title 18, U. S. C. A. § 201, with bribing an employee of the United States in a matter within his official capacity. The evidence showed that the defendants had given the government employee an automobile and over $31,000, to secure a priority or improper advantage over other purchasers of surplus government property. The Appellate Court reversed their conviction because the government employee had no authority and jurisdiction to do that which appellants sought by such payments to induce him to do, and, therefore, the offense was impossible of commission, and the government could not be defrauded in the manner the indictment charged.

We respectfully urge that this court should consider the question whether, in view of the provisions of Sections 694 and 694a, Title 38, United States Code, it was possible for the defendants to conspire that which the indictment charges, namely, "to cause the United States acting by and through said Veterans Administration to guarantee said loan, which the United States acting through said Veterans Administration would not guarantee were the true facts concerning the selling price of said residential property known to it."

POINT 7

A general verdict of guilty without special findings as to the acts on which it rests where it is not possible to identify the ground for the conviction will not be upheld where any of the separable acts are insufficient. (Cramer v. United States, 65 S. Ct. 918, 325 U. S. 1.)

The opinion of the Court of Appeals, apparently conceding that violation of Sections 694 and 694a, Title 38, United States Code is not an offense against the United States , in effect holds that the verdict may rest upon the proposition

that the conspiracy was one to violate § 80, Title 18, or to defraud the United States by causing the Veterans Administration to guarantee the loan.

The charge of the indictment upon which the case was submitted to the jury was, that defendants conspired: (1) to commit the offense of violating § 80, Title 18; (2) to commit the offense of violating §§ 694 and 694a, Title 38; and (3) to defraud the United States by causing it to guarantee the loan.

The verdict in this case was general and by it the jury found that a conspiracy existed but whether or not the verdict is based upon the jury's belief that the conspiracy was to commit any one or two or all three of the objects charged cannot be ascertained.

The decision of the Court of Appeals proceeds upon the theory that if any one of the three objects charged was established the verdict can stand but we urge that such ruling is erroneous.

We submit that a general verdict on a conspiracy indictment charging multiple objects of conspiracy cannot rest on proof of conspiracy to accomplish any one or less than all of the objects charged.

If there be no substantive offense of violating §§ 694 and 694a Title 38 United States Code, or if the evidence failed to show the conspired violation of § 80, Title 18, United States Code, or if the evidence was insufficient to show a conspired defrauding of the United States, the failure as to any one destroys the verdict in its entirety. We submit, therefore, that the decision of the United States Court of Appeals for the Tenth Circuit was in conflict with this court's decision in *Cramer v. United States,* 325 U. S. 1, 89 L. Ed. 1441, 65 S. Ct. 918, where this court said:

"The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts supbmitted was insufficient. *Stromberg v. California*, 283 U. S. 359, 368, 75 L. Ed. 1117, 1122, 51 S. Ct. 532; *Williams v. North Carolina*, 317 U. S. 238, 292, 87 L. Ed. 279, 282, 63 S. Ct. 207."

The decision is also in conflict with that of the Ninth Circuit in *Samuel v. United States*, 169 F. (2d) 787, where the Court held, in an unanimous en banc decision, that the doctrine of the Cramer case rules cases of conspiracy charging more than one offense as the objects thereof.

POINT 8

Error in permitting Ben T. Allison, a witness for the government, to make voluntary, derogatory and prejudicial statements on cross-examination not in response to any questions, which prejudice could be erased by an instruction to the jury to disregard the same.

The matter upon which this assignment is based, appears in the record at pages 163 to 167.

The damaging nature of the statements of the witness are as self-evident as the impropriety of permitting them to be made, and their effect was registered in the verdict, to secure which the prosecutor appealed to the passion and prejudice aroused thereby.

Their damaging effects were not, and could not be, overcome by the direction of the trial court to the jury to disregard them particularly when it did not halt the prose-

cutor's argument based thereon. As was said by Circuit Judge Frank, in *United States v. Grayson*, 166 F. (2d) 863, 871:

> "I think, however, he should have gone further and declared a mistrial. For the objectionable answers, once given, had such a character that no one can say that the judge's warnings effectively removed their poisonous consequences. Indeed, as experienced trial lawyers have often observed, merely to raise an objection to such testimony—and more, to have the judge tell the jury to ignore it—often serves but to rub it in."

To the same effect is the concurring opinion of Mr. Justice Jackson in *Krulewitch v. United States*, 69 S. Ct. 716, 723; 337 U. S. —; — L. Ed. —, where he said:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, Cf. *Blumenthal v. United States*, 332 U. S. 535, 559, 68 S. Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2d Cir., 167 F. (2d) 54."

In permitting the statements of the witness to be made over the objection of petitioners' counsel, it is submitted that the trial court so far departed from the fair and usual course of judicial proceedings, and the United States Court of Appeals for the Tenth Circuit in holding (p. 492 R.) that it committed no error or abuse of discretion in that respect so far sanctioned that departure as to call for the exercise of this court's powers of supervision.

POINT 9

The Trial Court erred in not noticing and correcting during the argument of the prosecutor an appeal to passion and prejudice upon matters not in evidence nor material to the issues and by reference to statements made by a witness and ordered stricken.

The matters upon which this assignment are based, appear in the record at pages 330, 331, 344 and 347 of the record and are set forth at pages 36 to 37, in the statement of the case in this brief.

The opinion of the United States Court of Appeals for the Tenth Circuit (p. 492 R.) does not question the impropriety and prejudicial effect of the prosecutor's conduct, as indeed it could not well do in view of the expression of this court in *Berger v. United States,* 295 U. S. 78, 88; 55 S. Ct. 6298, 633; 79 L. Ed. 1314, and the decisions of the Circuit Courts of Appeal in *Pierce v. United States,* 6th Cir., 86 F. (2d) 949, 953; *United States v. Sprengle,* 3d Cir., 103 F. (2d) 876; *Minker v. United States,* 3d Cir., 85 F. (2d) 425; *Ward v. United States,* 5th Cir., 96 F. (2d) 186; *Taliaferro v. United States,* 9th Cir., 47 F. (2d) 699; *Turk v. United States,* 8th Cir., 20 F. (2d) 129, but it says that it is not warranted in noting the objection for the first time on appeal (p. 295 R.).

In our discussion of the preceding assignment, which is based upon the error in the admission of the testimony, which the prosecutor based his argument on after it had been stricken, we quoted the statement of Circuit Judge Frank to the effect that to raise an objection to the testimony and to have the judge tell the jury to disregard it, only serves to rub it in. To further emphasize it by objection to the prosecutor's reference to it, would only serve

to further aggravate its poisonous effects on the minds of the jurors.

As a further ground for declining to note the misconduct, the Court of Appeals says that petitioners' counsel, in his opening remarks to the jury, complimented the prosecutor, and in so holding, overlooks the fact that the foul blow was struck in the prosecutor's reply, when petitioners' counsel had no opportunity to ward it off.

We respectfully submit that the argument of the prosecutor was such an appeal to passion and prejudice as to deny to petitioners the right to that fair and impartial trial, which it was as much the duty of the prosecutor as of the Court to assure to them, and that *Berger v. United States, supra,* and *Viereck v. United States,* 318 U. S. 236, 248, 87 L. Ed. 734, 63 S. Ct. 561, state the law which should govern in considering the error here complained of.

POINT 10

The Trial Court erred in giving erroneous, ambiguous and conflicting instructions to the jury.

The trial court charged the jury (p. 355 R.):

> "Now, the charge of conspiracy, gentlemen, is rather hard to understand, and I'll give you a further instruction on it. The Federal statutes provide that it shall be unlawful for two or more persons to conspire, confederate, or agree together to commit an offense against the United States * * *.
>
> "That means that if these defendants or *any two of them* had an understanding without a written agreement or without a formal agreement between themselves that they would carry out this scheme

> which the government charges, and one of them did something to carry it out, any one of the acts which I read to you as charged as overt acts, *then they are all guilty,* because after the conspiracy is formed, each conspirator is bound by the acts of the other conspirators, irrespective of whether they know what he is doing or not."

and further charged (p. 359 R.):

> "You are further instructed that this being a conspiracy case, while you must consider each defendant's case separately and his guilt separately, you cannot find him guilty of a conspiracy unless you find two or more of them conspired together. There are three defendants here, and the government charges that all three of them conspired. But if you think only two of them conspired, then you are justified in finding a verdict as to those two and acquitting the third one or any two out of the three that you may desire. *But, in order to justify an acquittal on conspiracy, you must find at least two or more were members of the conspiracy, and that one of those two did some act to carry out a conspiracy after it was formed."* (Italics ours.)

By these portions of the instructions the jury was told, in effect, to find all the defendants guilty if they believed there was a conspiracy; that if any two conspired, then all three were guilty; that in order to justify an acquittal of one, they must find two or more conspired.

These instructions are hopelessly confusing, ambiguous, unintelligible and conflicting. It is not the law that in order to *justify an acquittal* on conspiracy, the jury must find at least two or more were members of the conspiracy. We

submit that the converse is the law: That to justify a *conviction* on conspiracy, the jury must find at least two of them were members of the conspiracy.

In conspiracy cases, the danger of transference of guilt is so great that even the most clear and precise instructions by a trial court hardly suffice to guard against it. When the instructions are so ambiguous and unintelligible as those given in the case at bar, the rights of the individual defendant are completely sacrificed.

Speaking of the necessity of proper instructions in conspiracy cases, this Court said in *Kotteakos v. United States,* 328 U. S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557:

> "Here, if anywhere, cf. *Bollenbach v. United States, supra,* extraordinary precaution is required, not only that instructions may not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass."

In *Bollenbach v. United States,* 326 U. S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350 a conspiracy case, this Court said:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

In *Krulewitch v. United States,* 337 U. S. —, 69 S. Ct. 716, 720, Mr. Justice Jackson, concurring, said:

> "The modern crime of conspiracy is so vague that it almost defies definition."

and at page 721:

> "Thus the conspiracy doctrine will incriminate

> persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory,"

and again, at page 723:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong doing by somebody. It is difficult for the individual to make his own case stand on its own merit in the minds of jurors who are ready to believe that birds of a feather will flock together."

The foregoing passages demonstrate the necessity which exists for the greatest clearness in the instructions by which each defendant in a conspiracy case is entitled to have his individual guilt or innocence determined. Tested thereby, we submit that instructions given in the case at bar did not meet the requirements, and that the error was so substantial as to justify review and reversal by this Court.

POINT 11

Failure of the Court of Appeals to remand the cause to the District Court based upon newly discovered evidence.

The newly discovered evidence upon which petitioners moved in the United States Court of Appeals for the Tenth Circuit for a remand, appears at pages 472 to 485 in the record, and is summarized at pages 38 to 39 in the statement of the case in this brief.

It should be borne in mind that at the trial of the case at bar, the trial court had instructed the jury that if they believed from the evidence that the loan association knew the selling price of the property was $11,500, and not $10,600, then they must acquit.

In the second trial the government's principal witnesses retracted their testimony given in the case at bar, admitted that the same was untrue, and testified that in the closing of the transaction they and the petitioner E. Clifford Heald told the president of the loan association that the selling price was, in fact, $11,500.

The Court of Appeals, in its opinion, conceded that it had power to remand to the trial court for consideration of the newly discovered evidence, assigning as a reason for not doing so that it would not probably bring about a different result on a second trial (p. 494 R.). The only hypothesis upon which it could have failed to bring about a different result would be that the jury would disregard the instructions of the Court.

In *Martin v. United States,* 17 F. (2d) 973, 976, in considering the question of remand for newly discovered evidence, the Circuit Court of Appeals for the Fifth Circuit said:

> "In our opinion, it is the duty of the trial court to grant a new trial, where a witness at the original trial subsequently admits on oath that he committed perjury, or even that he was mistaken in his testimony, provided such testimony related to a material issue and was not merely cumulative. * * * We have no doubt that upon a proper showing it would be our duty to authorize the district court to exercise that discretion."

To the same effect is the holding of the Circuit Court of Appeals for the Fourth Circuit, in *Angle v. United States,* 162 Fed. 264, 266.

Speaking to the same point, the Circuit Court of Appeals for the Fifth Circuit, said in *Perry v. United States,* that

on motion to remand upon the grounds of such newly discovered evidence, if it should be made to appear that injustice had been done, it would be the duty of the United States Attorney to join in the application for a new trial.

CONCLUSION

Your petitioners respectfully submit that the Court of Appeals for the Tenth Circuit has failed to follow the applicable decisions of this Court and that a conflict exists between its decision and the decisions of other Courts of Appeal and of this Honorable Court, and that the Court of Appeals and the District Court erroneously interpreted and applied the Rules of Criminal Procedure and misconstrued the statutes involved herein, and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

BYRON G. ROGERS,
Attorney for Petitioners.

APPENDIX

STATUTES INVOLVED

Title 18, Sec. 88, United States Code, Now Title 18, Sec. 371

88. (Criminal Code, section 37.) Conspiring to commit offense against United States.—If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. § 5540; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, § 37, 35 Stat. 1096.)

Title 38, Secs. 694 and 694a, United States Code

Sec. 694(a). Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government by this title in an amount not exceeding fifty per centum of the loan: *Provided*, That the aggregate amount guaranteed shall not exceed $2,000 in the case of non-real-estate loans, nor $4,000 in the case of real-estate loans; or a prorated portion thereof on loans of both types or combination thereof.

(b) Loans guaranteed under this title shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this title and the regulations issued pursuant to section 504: *Provided,* That the liability under the guaranty within the limitations of this title shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation; *Provided, further,* That loans guaranteed under this title shall bear interest at a rate not exceeding 4 per centum per annum and shall be payable in full in not more than twenty-five years, or in the case of loans on farm realty in not more than forty years: *And provided further,* That (1) the maturity on a non-real-estate loan shall not exceed ten years; (2) any loan for a term in excess of five years shall be amortized in accordance with established procedure; (3) except as provided in section 505 any real-estate loan, other than for repairs, alterations or improvements, shall be secured by a first lien on the realty, and a non-real-estate loan, except as to working or other capital, merchandise, good will and other intangible assets, shall be secured by personalty to the extent legal and practicable.

(c) An honorable discharge shall be deemed a certificate of eligibility to apply for a guaranteed loan. Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the Administrator for a certificate of eligibility. Upon making a loan as provided herein, the lender shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of he veteran, amount and terms of the loan, and the legal description of the property, together with the appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of the guaranty. He shall also endorse on the veteran's discharge, or eligibility certificate, the amount and type of guaranty used, and the

amount, if any, remaining. An amount equivalent to 4 per centum on the amount originally guaranteed shall be paid to the lender by the Administrator out of available appropriations, to be credited upon the loan. Nothing herein shall be deemed to preclude the assignment of any guaranteed loan nor the assignment of the security therefor.

(d) Loans guaranteed hereunder may be made by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State or Territory, including the District of Columbia. Any loan at least 20 per centum of which is guaranteed under this title may be made by any national bank, or Federal savings and loan association; or by any bank, trust company, building and loan association or insurance company organized or authorized to do business in the District of Columbia; without regard to the limitations and restrictions of any other statute with respect to—

(1) ratio of amount of loan to the value of the property;

(2) maturity of loan;

(3) requirement for mortgage or other security;

(4) dignity of lien; or

(5) percentage of assets which may be invested in real estate loans.

(e) Any loan proposed to be made to an eligible veteran by any lender not of a class specified in subsection (d) may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this title as amended.

PURCHASE OR CONSTRUCTION OF HOMES

Sec. 964a. Any loan made to a veteran under this title, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as

his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this title, including the following:

(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraised designated by the Administrator.

Title 18, Sec. 80, United States Code, Now Title 18, Sec. 1001

80. (Criminal Code, section 35, amended.) Presenting false claims; aiding in obtaining payment thereof.—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made ny false or fraudulent statements or representations, or make or use or cause to be made or used

any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any manner within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. § 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996.)

Title 28, Sec. 632, United States Code

632. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (Mar. 16, 1878, c. 37, 20 Stat. 30.)

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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 285-287

E. CLIFFORD HEALD, LOUISE B. HEALD AND BRADLEY HEALD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 485-495) is reported at 175 F. 2d 878.

JURISDICTION

The judgments of the Court of Appeals were entered July 7, 1949 (R. 495-496), and a petition for a rehearing (R. 497-498), was denied July 28, 1949 (R. 499). The petition for writs of certiorari was filed August 24, 1949. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The numerous questions into which petitioners' presentation has subdivided the issues here may be summarized as follows:

1. Whether the evidence was sufficient to support the verdict.

2. Whether reversible error was committed during the impanelling of the jury, the conduct of the trial or in the form of the verdict.

3. Whether the Court of Appeals improperly denied petitioners' motion for a remand of the case to the District Court to consider a motion for a new trial on the ground of newly discovered evidence.

STATUTES INVOLVED

The pertinent provisions of the Act of June 22, 1944, c. 268, Title III, §§ 500, 501, 58 Stat. 291, as amended, 59 Stat. 626, 38 U.S.C. 694 and 694a, and of Section 35(A) of the Criminal Code, 18 U.S.C. (1946 ed.) 80, are set forth in the Appendix, *infra,* pp. 23-27.

STATEMENT

Petitioners were indicted under the general conspiracy statute, 18 U.S.C. (1946 ed.) 88, for conspiring to defraud the United States and to violate Section 35(A) of the Criminal Code by causing the Veterans Administration to guarantee, pursuant to 38 U.S.C. 694 and 694a, *infra,* pp. 23-27, a loan

made by the Silver State Savings and Loan Association of Denver, Colorado, on certain residential premises purchased by a veteran from petitioner Bradley Heald (R. 18-22). The object of the alleged conspiracy was to be achieved by falsely representing to the loan company that the selling price of the property was $10,600, its appraised value, which could not by law (38 U.S.C. 694a(3)) be exceeded without destroying eligibility for the loan guaranty by the Veterans Administration. The loan company would thereby be enabled to apply for and receive a government guaranty of part of the loan. In furtherance of the conspiracy, a false contract to sell at the appraised value was submitted to the loan company, whereas the genuine contract specified that the price was $11,500. (R. 18-22.)

Petitioners E. Clifford Heald and Louise B. Heald are the parents of Bradley Heald. The uncontradicted evidence showed that the latter was a builder who had erected a number of houses forming a development known as the Heald Project on land deeded to him by his father and another person (R. 258). By letter dated February 20, 1947, he requested the Veterans Administration to have these houses, which were then in the course of construction, appraised "for the purpose of sale to veterans who may wish to purchase with the assistance of G.I. loan financing" (R. 377). The Veterans Administration appointed a committee of appraisers (R. 378), who inspected the various

premises in the Heald Project (R. 131) and filed their report fixing the reasonable value of each individual house, when completed, at $10,600 (R. 379-384). Although the appraisal and report were made on or before March 1, 1947, the latter was not filed until March 18, 1947, because Bradley Heald had requested delay to permit him to submit additional information which, however, he did not do (R. 380). The appraisal was formally brought to his attention by letter dated April 4, 1947, from the Veterans Administration (R. 384). E. Clifford Heald also knew of this appraisal (R. 212).

On June 13, 1947, in response to a newspaper advertisement offering the houses in the Heald Project for sale at $11,500, John C. Hess, a veteran, and his wife visited Louise B. Heald (R. 63-64), who was selling these houses for her son on a commission basis (R. 266). Mr. Hess inquired whether the houses "would take" a G.I. loan and was told they would (R. 64; see also R. 267). Mr. and Mrs. Hess selected 984 Fairfax St. as the house they wished to purchase and Mr. Hess gave Mrs. Heald a check for $500 as a deposit on account of the $11,500 purchase price (R. 64-65). It was then arranged that on the following day Mr. Hess would come to an office shared by Mrs. Heald and her husband, an attorney, to prepare the formal papers (R. 65, 267).

Mr. Hess testified that the next day, June 14, he saw E. Clifford Heald at the latter's office and both executed a paper dated June 13, 1947, en-

titled "Receipt and Option" for the purchase of 984 Fairfax St. for $11,500 provided that a loan of $9,600 could be obtained (R. 66, 370-371). Heald signed in behalf of "Heald Investment Co., Broker" (R. 371), a trade name used by Mrs. Heald (R. 237).[1] Hess testified further that he then signed, without reading, some additional papers which Heald told him were copies of the first paper (R. 66, 68-69). Two of these, however, were not such copies but the original and a copy of another receipt and option for the same property, dated June 14, 1947, reciting a purchase price of $10,600, and signed, "Heald Investment Co., Broker, Louise B. Heald" (R. 68-70, 372-373). Hess' first knowledge of the contents of this paper, of which he had not been given a copy, came when it was shown to him on the occasion of his appearance before the grand jury (R. 68, 294-295). Mrs. Heald was not present at the signing (R. 271) nor was anyone else other than Hess and E. Clifford Heald (R. 70). Mrs. Heald testified that she was at the office and signed two receipt and option forms in blank on June 14, 1947, prior to the arrival of Hess, and left to attend to some other business (R. 270-271). She had told her husband and son that the price at which she had sold the house was $11,500 (R. 271).

Hess stated that thereafter, in response to a phone call from E. Clifford Heald, he returned to

[1] Some of the following testimony was controverted by one or more of petitioners.

the office on June 26, 1947, and gave him a check for $900 (R. 70-71). On this occasion, Bradley Heald and a person named Dicke, believed to be Bradley's partner, were also present (R. 71).

Some time before the closing of the transaction—the exact date is not clear from the record—Hess and E. Clifford Heald visited the office of the Silver State Savings and Loan Association where Hess, upon Heald's instruction, signed a Veterans Administration Home Loan Report in blank (R. 83, 385-387). Hess stated, "I was advised by Mr. Heald it needed my signature because of the Veteran's application" (R. 84).

The closing was effected on June 27, 1947, at the loan company office (R. 73). Present were Mr. and Mrs. Hess, E. Clifford Heald, Bradley Heald and Otis A. King, president of the loan company (R. 86). The closing statement, signed by Mr. and Mrs. Hess and Bradley Heald, recited a sales price of $10,600 (R. 73). This, Mr. Hess testified, was questioned by Mr. and Mrs. Hess, whereupon E. Clifford Heald "said something about the $900 payment, the down payment, and that's the way it was. Well, besides that there was some other discussion on some other item Bradley Heald and Mr. King were having at the time, and it was sort of passed over. Mr. Heald said that was it, so that was it" (R. 73).

Hess executed a deed of trust to secure the loan of $9,600 made by the loan company (R. 174) and paid $609.02 by check, which represented the $500

balance of the purchase price of $11,500, plus expenses incidental to the closing (R. 74-75). King testified that E. Clifford Heald brought to the closing the original and copy of the receipt and option, reciting the $10,600 price, which he said was the contract to be closed (R. 170-171). The transaction was then closed and a warranty deed executed by Bradley Heald to Mr. and Mrs. Hess (R. 173, 392-394). The revenue stamps, provided by Bradley Heald, were in the sum of $12.65, representing a price of $11,500 (R. 173).

King further testified that at a later date he gave one of the copies of the $10,600 receipt and option to an attorney of the Veterans Bureau (R. 172) and thereafter received a loan guaranty certificate from the Veterans Administration (R. 177, 394-395).

At the trial, after both sides had rested, petitioners moved for a judgment of acquittal, upon which decision was reserved (R. 302-320). Petitioners were found guilty by the jury and the motion was denied (R. 365). E. Clifford Heald was sentenced to serve eight months in jail and to pay a fine of $1,000. Bradley Heald and Mrs. Heald were fined $500 and $100, respectively (R. 368-369).

During the pendency of petitioners' separate appeals, petitioners E. Clifford Heald and Bradley Heald moved in the Court of Appeals for a remand of the case to the District Court for consideration of a motion for a new trial based upon newly dis-

covered evidence (R. 461-485). This motion was denied (R. 493-495) and the convictions were affirmed (R. 485-495).

ARGUMENT

1. Petitioners urge eleven separate grounds of error. Of these, Points 3 to 6, inclusive (Pet. 50-61), which we discuss first, are varied aspects of their position that, as a matter of law, the evidence failed to establish that they were guilty of a criminal conspiracy.

A. Their Point 3 (Pet. 50-53) argues that the motion for judgment of acquittal should have been granted since, the proof being circumstantial, it failed to establish the guilty knowledge essential to the charge. This conclusion, we submit, flies in the teeth of the facts. There was evidence which the jury could and did properly believe, and as to which petitioners do not raise any issue of credibility, that spelled out the conspiracy, not circumstantially, but directly. Much of this evidence was not challenged and some was actually corroborated by one or more of the petitioners themselves.

Thus, the testimony that Bradley Heald and E. Clifford Heald knew of the $10,600 appraisal and that they and Mrs. Heald knew of the sale to Hess at $11,500 stands uncontradicted. The fact that Mrs. Heald signed receipt and option forms in blank which she gave to E. Clifford Heald who inserted a sales price of $10,600 and had Mr. Hess sign them is likewise uncontroverted. Nor is there

any dispute over the fact that the closing statement signed by Bradley Heald recited a sales price of $10,600. That the loan company obtained from the Veterans Administration a guaranty based upon an application showing the selling price as $10,600 is conceded. None of this is circumstantial evidence.

There was, of course, controversy over some vital points in the case. But the jury, quite obviously, chose not to believe petitioners. The evidence which it did believe showed that E. Clifford Heald duped Hess into signing a receipt and option stating the purchase price to be $10,600, which Mrs. Heald had signed in advance, that he brought this to the closing and represented it as the true agreement, and that Bradley Heald joined in this misrepresentation by signing the closing statement which also recited a selling price of $10,600. There was, therefore, ample evidence to support the conclusion that all three petitioners had conspired to represent that the selling price to Hess was $10,600 so that a loan guaranty could be procured from the Veterans Administration.

What petitioners are arguing, however, is that there was no direct evidence that they had made an agreement to deceive.[2] But conspiracies, from their clandestine nature, generally are not provable directly, but only from statements and overt acts and the inferences to be drawn therefrom. E.g.,

[2] They argue, "The direct evidence concerned what the defendants had done, not what they had agreed" (Pet. 50).

Direct Sales Co. v. *United States,* 319 U.S. 703, 714. We submit that here the acts of all three petitioners were so plainly shown to have been in concert as to leave no doubt as to the existence of an agreement.

B. Petitioners argue, however, that, even assuming the existence of the conspiracy, it contemplated a violation of Sections 694 and 694a, Title 38, U.S.C., which are not penal in nature and that, consequently, the conspiracy could not have been one to commit an offense against the United States (Pet. 53-54). This argument overlooks the charge and proof that one of the objects of the conspiracy was to defraud the United States by impairing and obstructing the Veterans Administration in respect of its function of administering the loan provisions of those sections, which is itself an offense under the general conspiracy statute, 18 U.S.C. (1946 ed.) 88. See, e.g., *Glasser* v. *United States,* 315 U.S. 60, 66-67. And it completely overlooks the charge and proof that the conspiracy also had as one of its objects the violation of Section 35(A) of the Criminal Code (now 18 U.S.C. (1948 rev.) 1001), providing for fine and imprisonment for falsifying or concealing a material fact or making or causing to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any department or agency of the United States.

C. Likewise frivolous is petitioners' point that the false representations were not made in a matter within the jurisdiction of the United States (Pet. 54-59). The fact that the representations were made to the loan company and not directly to the Veterans Administration, upon which petitioners rely, is an irrelevancy. To sustain this contention would be tantamount to holding that a conspiracy indictment such as this could not lie so long as someone outside the conspiracy intervened between the Government and the conspirators, regardless of the latters' knowledge of the fraud and their intent that it be perpetrated. This argument, moreover, overlooks the fact that Mr. Hess testified that he signed the Veterans Administration Home Loan Report, which was an application for a loan guaranty, in the presence of E. Clifford Heald and at his direction (R. 83, 385-387). We submit, therefore, that the Court of Appeals was clearly right in holding that passing upon applications for guaranteed loans was within the jurisdiction of the Veterans Administration and that the false representation which petitioners caused to be made came within such jurisdiction (R. 488). *Todorow* v. *United States,* 173 F. 2d 439, 444-445 (C.A. 9), certiorari denied, 337 U.S. 925.[3]

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[3] *Terry* v. *United States*, 131 F. 2d 40 (C.A. 8), relied upon by petitioners (Pet. 55), is readily distinguishable. In that case, the defendant was indicted and convicted of violating Section 35(A) of the Criminal Code by making and causing to be made a certificate containing fraudulent statements in

D. Petitioners also argue that since 18 U.S.C. 694a makes the guaranty of a veteran's loan automatic, they could not have been guilty of conspiring to cause the Veterans Administration to guaranty the Hess loan (Pet. 59-61). As a subsidiary argument they seem to urge that they could not very well sell at a price in excess of the appraised value, thus preventing the guaranty from being effective, and at the same time be conspiring to procure a government guaranty which their own act would make impossible.

The answer to both these contentions is that the guaranty is automatic provided certain conditions are met. One of the conditions is that the selling price must not exceed the appraised value. The Veterans Administration has the duty of determin-

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a matter within the jurisdiction of the Federal Housing Administration. The certificate was procured by the defendant in connection with a sale for which a promissory note was given to a lumber company, which transferred it to the C.I.T. Corporation and which in turn sold it to its parent company, the Commercial Investment Trust, Inc. The latter company obtained insurance thereon from the F.H.A. The Court of Appeals reversed, holding that at the time the defendant procured the fraudulent certificate the matter was not within the jurisdiction of the F.H.A., apparently because the indictment failed to charge and, presumably, there was no proof that there was then any knowledge or intent that the loan would ultimately be insured by F.H.A. The court obviously felt that the intent to defraud the Government had neither been pleaded nor established and its judgment may have been influenced by the fact that the fraudulent certificate passed through the hands of three companies before insurance by the F.H.A. was obtained. Apparently, so far as the defendant was concerned, the matter might or might not ever reach the F.H.A. But, in the case at bar, the indictment charged and the evidence clearly showed that at the time of the conspiracy, petitioners had knowledge that an application for a loan guaranty would, and intended that it should, be made.

ing that the prescribed conditions exist and thereupon to issue a loan guaranty certificate. The object of the conspiracy was to reap the benefit of the guaranty by pretending to comply with the law. In the absence of discovery of the fraud the Government would be in no position to contest a claim under the guaranty.[4] The conspiracy to achieve such a result is punishable under 18 U.S.C. (1946 ed.) 88 and the indictment so charged.

2. All but one of petitioners' remaining contentions involve alleged errors in the selection of the jury, the conduct of the trial, and the form of the verdict.

A. There is no merit in petitioners' objection that the recall of Juror Beuthel, who had been peremptorily challenged by petitioners, was prejudicial error (Pet. 45-47). As the Court of Appeals correctly pointed out both the responsibility and failure to keep track of their peremptory challenges were petitioners' (R. 491). Having exhausted their peremptory challenges and then having improperly challenged this juror peremptorily, it was altogether proper for the trial judge to recall him (see R. 136-137). It was then open to petitioners by further examination to seek to ascertain whether he had been prejudiced by the occurrence

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[4] Section 509(c) of the Act of June 22, 1944, as amended (38 U.S.C. 694j(c)), provides that "The financial transactions of the Administrator incident to, or arising out of, the guaranty of loans pursuant to this subchapter, * * * shall be final and conclusive upon all officers of the Government."

and, if so, to challenge him for cause.[5] They chose, instead, to rest upon the speculative assumption that the mere challenge and recall might have created prejudice in the mind of this juror (R. 60). In the circumstances, the trial court's refusal to allow an additional peremptory challenge on so tenuous and insubstantial a ground was, we submit, a proper exercise of discretion. *Shepard* v. *United States*, 62 F. 2d 683, 684 (C.A. 10).

B. Petitioners assert that proffered testimony of E. Clifford Heald and Bradley Heald was improperly excluded (Pet. 27-32, 47-49). This testimony was apparently intended to show that the Silver State Savings and Loan Association knew, at the time of the closing that the property was being sold to Hess for $11,500 (R. 233), that E. Clifford Heald did not know that the loan company intended to apply to the Veterans Administration for a guaranty of the loan (R. 234), and that he did not know of the June 1947 appraisal (R. 235).[6]

The exclusion of this evidence presents no substantial question. Petitioners were charged with conspiring to cause the Government to guaranty a loan (R. 18-22). In effectuating the conspiracy

[5] Petitioners argue (Pet. 47) that counsel are not permitted to examine prospective jurors in this District Court. This, however, did not preclude them from requesting further inquiry by the court, as they were invited to do earlier in the proceedings (R. 51).

[6] Also objected to is the exclusion of testimony that the loan company had made loans of $9600 on other property in the Heald project without guaranty from the Veterans Administration. The irrelevance of such evidence is clear.

they caused the price to be represented to the Veterans Administration as $10,600 and supplied a contract of sale at that price. Whether or not the loan company actually knew that the true selling price was $11,500 could have no bearing upon their guilt. Conceivably, the loan company could have been willing to submit the application for the government guaranty so long as the company was supplied with a $10,600 contract, even though it knew such contract to be a fraud. Similarly, the purchasers, Mr. and Mrs. Hess, might have deliberately and knowingly joined in the falsification. Far from tending to establish the innocence of petitioners, such evidence would merely point to the participation of additional co-conspirators.

The exclusion of E. Clifford Heald's testimony that he was ignorant of any intention of the loan company to apply for a government guaranty was, at worst, harmless error, since both Bradley Heald and Louise B. Heald protested their innocence of any such knowledge (R. 263, 271) but were nevertheless found guilty. See Rule 52(a), F. R. Crim. P.; *Berger* v. *United States,* 295 U. S. 78, 80.

The June 1947 appraisal of the house sold to Hess, of which E. Clifford Heald attempted to show his ignorance, was, in fact, a report based in part upon and adhering to an appraisal of each of the houses in the Heald project made in February 1947 (R. 102, 110-111), of which, concededly, he and Bradley Heald were fully aware (R. 212, 259). The trial court properly held that the earlier appraisal

limited to $10,600 the price at which the property could be sold without destroying eligibility for a Veterans Administration guaranty (R. 119). Petitioners are not now challenging that ruling. Consequently, the admitted knowledge of the February appraisal makes wholly irrelevant the claimed ignorance of the June report, which also fixed the appraised value at $10,600.

C. The contention that the general verdict of guilty in this case makes it impossible to identify the basis of the conviction (Pet. 61-63) is completely devoid of substance.[7] It rests upon the misconception that petitioners were charged with conspiring to effect three separate and distinct offenses, i.e., violating Section 35(A) of the Criminal Code, violating 38 U.S.C. 694 and 694a, and defrauding the Government by causing it to guarantee the loan. The indictment charged a single conspiracy to defraud the United States and to violate Section 35(A). The fraud consisted of impairing and obstructing the functions of the Veterans Administration in guarantying loans under 38 U.S.C. 694 and 694a and it was an integral part of such fraud that petitioners would cause the loan company to present a false statement to the Government. The dual aspects of the conspiracy, as charged and proved, were inseparable and the proof as to the false statement established also the fraud. Hence, there is no occasion to consider the

[7] It is, morever, raised here for the first time.

question whether the convictions rest upon one of several bases, and *Cramer* v. *United States,* 325 U. S. 1, upon which petitioners rely (Pet. 62-63), is wholly inapposite.

D. Petitioners' complaint concerning voluntary and allegedly prejudicial statements of the witness Ben T. Allison (Pet. 63-64) involves only one statement magnified beyond its real significance. The witness was one of the appraisers of the Heald project. He was being cross-examined by counsel for petitioners concerning a meeting participated in by himself, the other appraisers, Bradley Heald and others. The meeting was had to consider objections of Heald and others that the February 1947 appraisal of the Heald project was too low (R. 162-164). Allison had been asked about a discussion of the appraisal at this meeting (R. 163) and, in the course of his answer, he referred to a statement of Bradley Heald, concerning the appraisers' report of the water condition, to the effect that they "could go dig a hole, each of us, and put a can in it and he would drink all the water that would run in that can" (R. 165). Shortly thereafter the witness volunteered the statement to which objection is taken: "The water that was in the can that he spoke of is now in the basements and the basements are heaving and there is water in most of them" (R. 165). This statement was stricken on petitioners' motion and the jury was instructed to disregard it (R. 167). There had already been some testimony,

without objection, as to the shoddy construction of the houses in the Heald project (R. 156). Thus, while the statement of this witness was not responsive and was therefore properly stricken, it certainly did not warrant declaring a mistrial of a case already well into its second day. Moreover, petitioners made no motion for a mistrial. All they asked was that the offending statement be stricken and their request was granted.

E. Neither is there any substance in petitioners' complaint that the trial court erred in failing to note and correct four statements made by the prosecutor in his summation to the jury (Pet. 65-66; R. 330, 331, 344, 347). Of these, three were perhaps improper because they concerned no issue in the case. The fourth (R. 347), on the other hand, was a fair comment upon the evidence, well within the scope of proper advocacy. Two of the questionable statements were made in the first half of the prosecutor's argument (R. 330, 331). Their impact and seriousness may be judged from the fact that, far from objecting, petitioners' counsel opened his argument with praise of the prosecutor, not only as a lawyer but as a gentleman (R. 332). The other remarks to which petitioners now object were made in the closing part of the prosecutor's argument. But again petitioners failed to object. We submit that the Court of Appeals was entirely correct in finding nothing in the circumstances here to warrant an exception to the rule that an objec-

tion such as petitioners urge, when made for the first time on appeal, is made too late. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239; *N.Y.C. R.R. Co.* v. *Johnson*, 279 U. S. 310.

F. The claimed errors in the trial court's instructions to the jury (Pet. 66-69) are significant only when read out of context.

Two statements are involved. The first was to the effect that if the defendants or any two of them conspired and one committed any of the overt acts charged then all were guilty (R. 355). That this was nothing but an inadvertence which was corrected is evidenced by the further statement of the Court, "* * * if you think that only two of them conspired, then you are justified in finding a verdict of guilty as to those two and acquitting the third one * * *" (R. 359). The other statement objected to was patently either a slip of the tongue or a typographical error. The record shows (R. 359), "in order to justify an acquittal", when the trial judge clearly intended, "in order to justify a conviction."

These are the sole objections to the charge, a reading of which, we submit, shows that it was altogether clear and more than fair to petitioners. Moreover, petitioners not only failed to object, *Kempe* v. *United States*, 160 F. 2d 406, 411 (C.A. 8), certiorari denied, 331 U. S. 843, but actually indicated their approval of these instructions when

they took their only relevant exception as follows (R. 362):

> [We except] To Your Honor's instruction that two or more make up the conspiracy which, of course, is true, but to the manner in which your Honor instructed in connection with that, namely, that they could convict and acquit one, without pointing out very clearly that they could under the evidence acquit all.

We think that if petitioners had noticed the slips of which they now complain they would not and certainly should not have remained silent. But if, as is more likely the case, they failed to note the errors, it seems reasonable to assume that the jury was not misled.

3. Finally, petitioners urge that the Court of Appeals improperly failed to remand the case to the District Court for consideration of a motion by E. Clifford and Bradley Heald for a new trial based upon newly discovered evidence (Pet. 69-71). The new evidence consisted of evidence adduced in a subsequent trial of E. Clifford and Bradley Heald for the substantive offense of causing a false statement to be presented to the Veterans Administration in connection with the Hess transaction. Petitioners claim that this evidence tended to show that King, the president of the loan company, contrary to his and other testimony at the trial below, knew that the actual sale price to Hess was $11,500.

Petitioners place heavy reliance in their plea for a new trial upon the fact that the trial court charged the jury that if they believed the loan company knew that the selling price was $11,500 and not $10,600 they must bring in a verdict of not guilty (R. 353).

This instruction, we submit, was patently erroneous and one to which petitioners were not entitled. As we have already said (*supra*, p. 15), if the loan company had such knowledge it indicated merely that there were more conspirators than the three who were indicted. That fact, however, would by no means tend to minimize petitioners' guilt. Consequently, the alleged guilty knowledge of King presents no reasonable basis for believing that proof thereof at a new trial would produce a different result with a properly instructed jury. *Long* v. *United States*, 139 F. 2d 652, 654 (C. A. 10); *Evans* v. *United States*, 122 F. 2d 461, 468-469 (C. A. 1). The Court of Appeals' holding to this effect was, therefore, proper (R. 494).[8]

Moreover, the motion for a new trial should properly have been made in the District Court without requesting a remand for that purpose by the Court of Appeals. If that had been done, review of a denial of the motion would have been available to petitioners in the pending appeal. Only if the trial court had been disposed to grant

[8] Corroborative of the correctness of this holding is the fact that at the subsequent trial of E. Clifford and Bradley Heald both defendants were convicted.

the motion would a remand have been necessary. Rule 33, F. R. Crim. P.;[9] *Rakes* v. *United States*, 163 F. 2d 771 (C. A. 4), certiorari denied, 335 U. S. 826.

Finally, petitioners do not seem to be precluded even now from making their application in the District Court.[10]

CONCLUSION

None of petitioners' contentions presents a real issue warranting review by this Court. The petition for writs of certiorari should therefore be denied.

Respectfully submitted,

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[9] The notes of the Advisory Committee to Rule 31(c) of the Preliminary Draft (pp. 136-137) and Rule 35 of the Second Preliminary Draft (p. 131), which were the counterparts of the present Rule 33, explain that the procedure was deliberately changed to permit *consideration* of a motion for a new trial on the ground of newly discovered evidence without requiring a remand from the Court of Appeals.

[10] Rule 33 allows two years from "final judgment" for such a motion. The judgments of conviction were entered on July 19, 1948 (R. 35-37).

APPENDIX

The Act of June 22, 1944, c. 268, title III, 58 Stat. 291, as amended, 59 Stat. 626, provides:

Sec. 500 [38 U.S.C. 694].

(a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government by this title in an amount not exceeding fifty per centum of the loan: *Provided,* That the aggregate amount guaranteed shall not exceed $2,000 in the case of non-real-estate loans, nor $4,000 in the case of real-estate loans; or a prorated portion thereof on loans of both types or combination thereof.

(b) Loans guaranteed under this title shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this title and the regulations issued pursuant to section 504: *Provided,* That the liability under the guaranty within the limitations of this title shall decrease or increase

pro rata with any decrease or increase of the amount of the unpaid portion of the obligation: *Provided further,* That loans guaranteed under this title shall bear interest at a rate not exceeding 4 per centum per annum and shall be payable in full in not more than twenty-five years, or in the case of loans on farm realty in not more than forty years: *And provided further,* That (1) the maturity on a non-real-estate loan shall not exceed ten years; (2) any loan for a term in excess of five years shall be amortized in accordance with established procedure; (3) except as provided in section 505 any real-estate loan, other than for repairs, alterations or improvements, shall be secured by a first lien on the realty, and a non-real-estate loan, except as to working or other capital, merchandise, good-will and other intangible assets, shall be secured by personalty to the extent legal and practicable.

(c) An honorable discharge shall be deemed a certificate of eligibility to apply for a guaranteed loan. Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the Administrator for a certificate of eligibility. Upon making a loan as provided herein, the lender shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the

appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of the guaranty. He shall also endorse on the veteran's discharge, or eligibility certificate, the amount and type of guaranty used, and the amount, if any, remaining. An amount equivalent to 4 per centum on the amount originally guaranteed shall be paid to the lender by the Administrator out of available appropriations, to be credited upon the loan. Nothing herein shall be deemed to preclude the assignment of any guaranteed loan nor the assignment of the security therefor.

(d) Loans guaranteed hereunder may be made by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State or Territory, including the District of Columbia. Any loan at least 20 per centum of which is guaranteed under this title may be made by any national bank, or Federal savings and loan association; or by any bank, trust company, building and loan association or insurance company organized or authorized to do business in the District of Columbia; without regard to the limitations and restrictions of any other statute with respect to —

(1) ratio of amount of loan to the value of the property;

(2) maturity of loan;

(3) requirement for mortgage or other security;

(4) dignity of lien; or

(5) percentage of assets which may be invested in real estate loans.

(e) Any loan proposed to be made to an eligible veteran by any lender not of a class specified in subsection (d) may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this title, as amended.

Sec. 501 [38 U.S.C. 694a]. Any loan made to a veteran under this title, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this title, including the following:

(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and

expenses; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator.

At the time of the alleged conspiracy involved, Section 35(A) of the Criminal Code, 18 U.S.C. (1946 ed.) 80, provided:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter

within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

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